No. 2643.

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHERN PACIFIC COMPANY, a corporation,

*Plaintiff in Error,*

vs.

CALIFORNIA ADJUSTMENT COMPANY, a corporation,

*Defendant in Error.*

## BRIEF OF DEFENDANT IN ERROR

In Error to the United States District Court for the Northern District of California, Second Division.



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### STATEMENT OF THE CASE

The statement of the case appearing in the brief of plaintiff in error at pages 1 to 19, is generally correct with the following exceptions:

In quoting the provisions of the Constitution of California, which plaintiff in error states must be considered, no reference is made to Section 22 of Article I, reading as follows:

Sec. 22. *The provisions of this constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.*

The above quoted provision has formed a part of the Constitution of California ever since 1879.

At page 9, plaintiff in error states that it was claimed by defendant in error, and held by the District Court, that although the rates collected were "fixed" by the Commission, nevertheless the charges made in pursuance of rates so "fixed" were illegal. Defendant in error has never claimed that these rates were "fixed" by the Commission. The position of defendant in error has been that the Commission had no authority to fix rates which contravened the Constitutional provisions and that if it attempted to do so its action was void. The District Court (Tr. of Record, Vol. 2, p. 365) held:

> "Before the Amendment the Commission was as powerless to fix rates in contravention of the prohibition as the carrier was to charge them; and if it assumed to do so, its act was simply void and not only cast no obligation upon the carrier to obey its order, but afforded no protection for such obedience."

Another somewhat incorrect statement is that "it was claimed by defendant in error and held by the District Court, that immediately on taking effect of the constitutional amendment of October 10, 1911, all rates violative of the long and short haul clause contained in Section 21 of Article XII as then amended, *no matter what might have been their previous status, immediately became illegal* to the extent that the greater charge for the shorter distance exceeded the lesser charge for the longer distance." The position of defendant in error was not that these rates "became illegal" upon the amendment to the constitution, but that they were illegal at the time of such

amendment, and that the purpose of the amendment was to legalize thereafter rates violative of the long and short haul prohibition whereupon application of the carrier and after investigation the Commission granted relief from the prohibition. The District Court said (Record p. 394):

> "All we are concerned with here, Mr. Booth, under the issues in this case, is any instances in which the Railroad Commission upon application has made an order authorizing suspension, that is authorizing a deviation from the provisions of the constitution in question. That power was given them by the amendment of October 10, 1911. Any instance where they did not authorize it, it was just as obligatory upon the carrier as it was before."

Incidentally the defendant in error also maintained that even if such rates had been legal prior to October 10, 1911, the amendment to the Constitution of that date would have rendered them illegal until relief was granted by the Commission.

The statement that the answer of defendant "denied the material allegations of the complaint" is also erroneous, as all of the material allegations of the complaint were admitted by the answer.

The first 85 causes of action accrued under Section 21 of Article XII of the Constitution as it existed prior to the amendment of October 10, 1911. The material part of the section was as follows:

> "Persons and property transported over any railroad, or by any other transportation company or individual, shall be delivered at any sta-

> tion landing or port, at charges not exceeding the charges for the transportation of persons and property of the same class, in the same direction, to any more distant station, port or landing."

The causes of action number 86 to 120, both numbers inclusive, accrued under Section 21 of Article XII as amended October 10, 1911. The material portion of the section as amended is as follows:

> "It shall be unlawful for any railroad or other transportation company to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation, as a through rate than the aggregate of the intermediate rates. Provided however, that upon application to the Railroad Commission provided for in this constitution, such company may, in special cases, after investigation, be authorized by such Commission to charge less for longer than for shorter distances for the transportation of persons or property, and the Railroad Commission may from time to time prescribe the extent to which such company may be relieved from the prohibition to charge less for the longer than for the shorter haul."

Judgment was rendered in favor of plaintiff as prayed for in its complaint.

In its brief plaintiff in error contends that the judgment of the District Court should be reversed for the following alleged reasons:

1. That Section 21 of Article XII of the Constitution of 1879, as it existed prior to October 10, 1911, is invalid because in terms it attempts to regulate interstate commerce, and that such alleged attempt is so intermingled with its other provisions that it will not be presumed that the people would have adopted the Section if the invalidity of the portion attempting to regulate interstate commerce had been known.

2. That the long and short haul provisions of the Constitution violate the Fifth and Fourteenth Amendments to the Federal Constitution.

3. That defendant in error has no right to action to recover the excessive charge either at common law or under a statutory provision.

4. That defendant in error had no cause of action to recover the illegal charges because no formal protest was made at the time of their payment.

5. That, as to the causes of action accruing after the amendment of October 10, 1911, the Commission made a series of orders "with the intention of preserving the status of the rates then being charged by plaintiff in error until it could be determined whether, and, if so to what extent, it was entitled to relief." This contention is coupled with the further contention that the charges collected were those in existence on October 10, 1911, and that they were legally established by the Commission prior to that date.

6. That the motion for a nonsuit should have been granted as to the causes of action accruing after October 10, 1911, because the defendant in

error (plaintiff below) did not offer evidence that the plaintiff in error had not been relieved from the prohibition to charge less for the longer than for the shorter haul.

7. That the complaint is defective because it is not alleged therein that plaintiff or its assignors obtained a reparation order from the Railroad Commission.

In the brief of defendant in error we shall reply to these contentions of plaintiff in error *seriatim* and under the following heads:

1. That the long and short haul provision of the Constitution of 1879 does not in terms attempt to regulate interstate commerce, and even if it were susceptible of such construction, it could not be said that the people would not have prohibited the charging of more for the short than for the longer haul within California had they known that they could not enforce such a prohibition in the case of interstate commerce.

2. The long and short haul clause of the Constitution of 1879 and the long and short haul clause of the Constitution as amended October 10, 1911, do not violate the Federal Constitution.

3. A person who is required to pay more than the legal charge for the transportation of freight has a common law right to recover the overcharge and in addition to such common law right, has the statutory right conferred by the statutes of 1909, 1911 and the Public Utilities Act.

4. That it is wholly immaterial whether formal protest was made at the time of the payment of the illegal charges.

5. That the evidence sought to be introduced by plaintiff in error fails to show that the Railroad Commission

relieved plaintiff in error from the provisions of Section 21 of Article XII of the Constitution against charging less for the longer than for the shorter haul.

6. The Railroad Commission had no power to establish rates contravening the constitutional provision, and if it assumed to do so its act was void.

7. That it was not incumbent upon the plaintiff below to prove that the Commission had not relieved plaintiff in error from the prohibition of the Constitution, because if such relief had been granted, it was a matter of defense which the law requires the defendant to plead and prove.

8. No reparation order of the Railroad Commission was necessary in order to entitle the plaintiff, or its assignors, to maintain an action in the courts.

**1. THAT THE LONG AND SHORT HAUL PROVISION OF THE CONSTITUTION OF 1879 DOES NOT IN TERMS ATTEMPT TO REGULATE INTERSTATE COMMERCE, AND EVEN IF IT WERE SUSCEPTIBLE OF SUCH CONSTRUCTION, IT COULD NOT BE SAID THAT THE PEOPLE WOULD NOT HAVE PROHIBITED THE CHARGING OF MORE FOR THE SHORT THAN FOR THE LONGER HAUL WITHIN CALIFORNIA HAD THEY KNOWN THAT THEY COULD NOT ENFORCE SUCH A PROHIBITION IN THE CASE OF INTERSTATE COMMERCE.**

The long and short haul provision of the Constitution of 1879 was contained in Section 21 of Article XII, which reads as follows:

Section 21:

> "No discrimination in charges or facilities for transportation shall be made by any railroad or other transportation company between places or persons, or in the facilities for the transportation of the same classes of freight or passengers within this state, or coming from or going to any other state. *Persons and property transported over any railroad, or by other transportation company or individual, shall be delivered at any station, landing, or port, at charges not exceeding the charges for the transportation of persons and property of the same class, in the same direction, to any more distant station, port, or landing.* Excursion and commutation tickets may be issued at special rates."

Plaintiff in error states that the above quoted section "expressly endeavors to regulate rates charged by California carriers, no matter whether such rates relate to interstate or intrastate movements."

Plaintiff in error further states:

> "The section therefore is one prohibiting discrimination, and it seems perfectly clear that the framer of the section had in mind the protection of places and persons in California against discrimination by a railroad, no matter whether such discrimination consisted in the application of interstate rates or in the application of intrastate rates, or a combination of both."

There are two complete answers to this contention. The first is *that the long and short haul provision makes no reference to interstate commerce, and the second is that even if it could be otherwise construed, it will be presumed that the people intended to make discrimination (charging more for the short haul is a specific kind of discrimination) unlawful in intrastate commerce whether or not the prohibition against discrimination could apply to interstate commerce.*

The first sentence of Section 21 of Article XII prohibits discrimination in charges or facilities "between places or persons * * * within this state, or coming from or going to any other state."

*The second sentence which contains the long and short haul prohibition does not make any reference to places outside of the State, or to interstate transportation. It contains the law of California with reference to such charges. The people of California were instituting an organic law to regulate the transportation of persons and property within the State. As to such transportation their power was supreme and the language used was unobjectionable. It was wholly unnecessary for them to qualify the clause with a provision that the transportation should begin*

*and end within the state as such was its legal effect in the absence of such qualification.*

The second sentence containing the long and short haul clause does not depend upon the first sentence of the Section. The second sentence contains a complete provision in itself. No reference need be made to the first sentence in determining the meaning of the second. The abrogation of the first sentence would not repeal or in any manner impair the provisions of the long and short haul clause contained in the second sentence. It is true that the charging of more for the short than for the long haul is a species of discrimination. Yet the people saw fit to segregate that particular kind of discrimination and to enact a prohibition against it in definite terms. In no sense can it be said that the long and short haul prohibition is an inseparable part of the provision contained in the first sentence. The fact that it is not a part thereof at all but a separate and independent enactment.

Counsel for plaintiff in error state:

> "It may be claimed by defendant in error that Section 21 of Article XII of the California Constitution is separable as respects the three sentences constituting the section, and that even though the first sentence be vulnerable to attack on the ground that it is a palpable effort to regulate interstate commerce, the second sentence is not subject to the same objection * * * We think the Section should be considered as an entirety, as an effort to forbid discrimination, but if it be susceptible of division into sentences, the vice remains in the second sentence."

Counsel then quote the long and short haul provision, italicizing the words "any station" and "any

more distant station". It is then argued that the provision applies in terms to transportation, for instance, from Oakland to Sacramento in the event a lower rate was charged for a similar shipment from Oakland to Reno, Nevada—this because Reno is a "more distant station."

It must be apparent, however, that this contention will not bear analysis. The "vice" of which counsel complain could only be removed by *an express proviso that all stations, viz. the short or long haul points should be within the State.*

Surely it cannot be maintained that a State, in legislating upon matters within its competence, is under the necessity of adding to the statute a declaration that the statute shall not be construed to affect matters without its territorial limits and over which it has no authority to legislate.

It will not be presumed that the people intended that the Constitution should be construed so as to render it subject to the objection that it undertook to regulate interstate commerce. On the contrary the well known rule will be applied that constitutional and statutory provisions which are attacked on the ground of alleged unconstitutionality will be construed so as to uphold their validity even in doubtful cases.

This, however, is not in any sense a doubtful case. The terms of the long and short haul provisions of Section 21 can be given full force and effect by limiting their application to intrastate commerce. The idea that a California rate might, under this provision, be based on an interstate rate to Reno would certainly never occur to any person who had a proper

conception of the power of the state over its intrastate commerce.

This case involves intrastate shipments only. The points of shipment, points of delivery and the more distant point to which the lower rate was charged are all within the State of California. As a defense to this action, the far-fetched argument is made that the Constitutional provision is invalid because its terms are broad enough to support the admittedly unsound contention that the rates for the transportation of goods to a point within California should not be higher than the interstate rate to a "more distant" point out of the State.

It cannot be that a statute or constitutional provision of a state which can be given full force within the State will be held invalid because if applied to extra-state matters it would contravene the Federal Constitution. Such a construction would do violence to the fundamental rule that the provisions of a state constitution are presumably valid and that every presumption is in favor of their constitutionality.

If there were any merit in this contention it could be made with equal force against the validity of the long and short haul provisions of Section 21 of Article XII as they now exist. The Section as it now stands provides that it shall be unlawful "to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance." Reno is a "longer distance" from Oakland than Sacramento is from Oakland and it is over the same line and in the same direction. The meaning of the exist-

ing Section, therefore, is subject to be distorted in precisely the same manner as plaintiff in error seeks to distort the meaning of the former Section.

The case of *Wabash, etc., Co.* v. *Illinois,* 118 U. S. 557, cited by plaintiff in error is directly against its contention. In that case, as is stated at page 40 of the brief of plaintiff in error, a statute of Illinois provided that if a carrier charged for transportation "for any distance within the State" the same or a greater amount than at the same time was charged for the transportation in the same direction of the same class of property "over a greater distance of the same road" such charge should be *prima facie* evidence of unjust discrimination. In construing the statute the Supreme Court of Illinois held that a charge for a haul within the State which exceeded the charge for a haul to a point which was beyond the State line rendered the carrier guilty of unjust discrimination under the Act. (*People* v. *Wabash, etc., Co.,* 104 Ill. 476.) The case went to the United States Supreme Court on writ of error and that Court held that it was bound by the construction placed upon the Act by the Supreme Court of Illinois. Being so bound, the Supreme Court was constrained to hold that the section of the Act in question was unconstitutional insofar as it attempted to regulate interstate commerce. In rendering its decision, however, the Supreme Court clearly intimated that if the matter were before that Court for decision it would not have construed the Statute to apply to interstate commerce. The Court said:

> "It might admit of question whether the statute of Illinois, now under consideration, was designed by its framers to affect any other class

of transportation than that which begins and ends within the limits of the State."

The Supreme Court further said:

> "Of the justice and propriety of the principle which lies at the foundation of the Illinois statute it is not the province of this Court to speak. As restricted to a transportation which begins and ends within the limits of the State it may be very just and equitable, and it certainly is the province of the State legislature to determine that question."

Counsel for plaintiff in error state that the result of the decision of the Supreme Court in *Wabash, etc., Co.* v. *Illinois, supra,* was that "the whole section fell to the ground." Of course no such result followed from the decision of the Court. All that the Supreme Court held was that the plaintiff in error in that case had not violated any constitutional law of Illinois. Nothing in that decision impaired the validity of the statutory provision as applied to transportation beginning and ending in the State of Illinois. Nor did the decision of the Illinois Supreme Court reversed by the United States Supreme Court hold that the statute, as applied to transportation beginning and ending within the State, was not enforceable. That question was not involved in the case. There was nothing in the decision of the United States Supreme Court which would have prevented the Illinois Court in a future case involving intrastate transportation from holding that the statute was valid and enforceable as to such transportation. Not only is this so, but the decision of the United States Supreme Court would have directly supported such a decision.

The second answer to the contention that the long and short haul provisions of the Constitution of 1879

in terms attempts to regulate interstate commerce is that *even if the provisions had in terms applied to both intrastate and interstate commerce, it would be presumed that the people intended to enact the provision insofar as it applied to intrastate commerce even if they had known that it could not constitutionally apply to interstate commerce.*

As we have seen the contention here is based mainly upon the words "or coming from or going to any other state" at the end of the first sentence of Section 21. The first sentence of Section 21 contains the general prohibition against discrimination in charges or facilities. The prohibition of the first sentence of Section 21 is against discrimination in charges or facilities for transportation "within this state" and "coming from or going to any other state."

The contention of plaintiff in error is that the people would not have prohibited discrimination in California if they knew that they could not validly prohibit it as to interstate shipments coming to or going from California. The mere statement of this proposition would seem to refute it.

*The people realized the evils of discrimination and desired to prevent them in every possible way. They enacted a prohibition against discrimination in intrastate transportation and coupled to this prohibition a prohibition against discrimination in interstate transportation. What possible basis is there in reason for the argument that they would not have prevented the evils of discrimination in California had they known that they could not prevent them elsewhere?*

The authorities cited by plaintiff in error in support of this contention furnish the strongest argu-

ment against its unsoundness. In the case of *Sargent* v. *Rutland Railroad Company,* 85 Atl. 654 (Vt.) the statute provided that "no railroad doing business in the state" should charge, collect or receive "any demurrage charge on freight received at any station in this state" until four days after notification to the consignee; and another section of the statute provided that no railroad doing business in the State should charge any demurrage on any car "placed or held for loading in this state" until four days after notification to the consignor.

The Vermont Statute applied to a very different matter than the matter of rates for the transportation of freight or passengers or to the matter of the prohibition of discrimination. It related to the right of the railroads to charge demurrage on freight cars held by a consignee for the purpose of unloading. The Vermont court pointed out that a partly loaded car coming into the State might have local freight loaded into it and that under the Act (applying it only to local shipments) demurrage could not be charged unless the consignee who received the local freight took over four days to unload his freight, whereas the shipper whose freight came from without the State was obliged to pay demurrage at the rate of $1.00 per day in pursuance of the regulations of the Interstate Commerce Commission. The Court said:

> "The effect of these provisions seems to be such, among other things, that when a foreign car comes into this state loaded with freight of a nature to be taken from the car by the consignee, destined in part for each of two points in the state, domestic freight of like nature between such places, going in the same direction,

> may be carried at the same time in the same car; and in returning the car to the home road it may be engaged at the same time in carrying freight of the same nature in part destined for some points within the state and in part for some point beyond the state. Thus such cars may concurrently be instruments of state and of interstate commerce, and this seems likely to be of such frequent occurence in the practical operations under the car service rules, as to render it proper of notice in determining the questions before us; for the constitutionality of a law is to be tested, not by what has been done under it, but by what may rightfully, by its authority, be done."

The court reached the conclusion that the statute could not be applied to local traffic without in many instances directly affecting interstate traffic. It therefore held that the legislature must have intended when it enacted the statute that it should apply to both intrastate and interstate commerce. As already pointed out such a statutory provision could not without great difficulty be applied to local traffic alone; and the language of the act being all inclusive, the court adopted the view that the legislature might not have enacted the statute at all if they had known that it would apply to cars containing local shipments only. The matter of freight rates for transportation or the matter of discrimination are entirely different matters. There is no possibility of an interstate freight movement being confused with an intrastate freight movement. Each movement is a distinct and separate transaction. Even if a state act in terms applied to interstate shipments, the portion thereof so applying, would, under well established rules of construction, be held invalid without impairing the validity of the portion applying to intrastate shipments.

The *Employers' Liability Cases,* 207 U. S. 463, do not support the contention of plaintiff in error that the people of California would not have declared discrimination unlawful in California had they known they could not exact a valid prohibition against it in interstate commerce. The Act of Congress in question applied in terms to all carriers engaged in interstate commerce and imposed a liability upon them in favor of all their employees without restriction as to the business in which the carriers or their employees might have been engaged at the time of the injury. In replying to the contention that the words "any employee" found in the statute should be held to mean any employee when such employee was engaged in interstate commerce the Supreme Court said that the provisions were *indivisible* and further said that even if they had been divisible the rule contended for would only apply where it was plain that Congress would have enacted the provision with the unconstitutional provision eliminated.

The difference between the statute under consideration in the *Employees' Liability Cases* and the first sentence of Section 21 is that the provisions of the Act of Congress were indivisible whereas the provisions of the first sentence of Section 21 are divisible. *The main difference, however, is that from the very nature of the subject matter of Section* 21 *it is clear that the people would have forbidden discrimination in California even if they knew they could not prohibit it in interstate commerce.*

The provisions of the first sentence of Section 21 are in no material respect different from a statute providing that all carriers in the State should publish and file schedules showing their rates for intra-

state movements and also for all interstate movements originating or ending in the State, and that no rate in excess of those published should be charged. The part of the statute applying to interstate shipments would be void, but there would be no force in the contention that the legislature did not intend that this salutary and general provision of the statute should be enforced at all unless that part of it applying to interstate commerce could be enforced.

The contention that the long and short haul provision of the Constitution of 1879 "in terms attempts to regulate interstate commerce" was not made in the District Court although the case was elaborately argued and briefed in that court. In fact the brief filed by plaintiff in error in that Court was more voluminous than the brief filed in this Court. This contention is the result of an afterthought. Nevertheless this contention is given first consideration here. Possibly if the contention had been made in the Court below and counsel had had an opportunity to consider the arguments against it, the contention might have been accorded a somewhat less prominent place in the brief of plaintiff in error.

## 2. THE LONG AND SHORT HAUL CLAUSE OF THE CONSTITUTION OF 1879 AND THE LONG AND SHORT HAUL CLAUSE OF THE CONSTITUTION AS AMENDED OCTOBER 10, 1911, DO NOT VIOLATE THE FEDERAL CONSTITUTION.

As stated by the learned Judge of the District Court, the Supreme Court of the United States in the case of *Louisville & Nashville Railway Co.* v. *Kentucky,* 183 U. S. 503, and in the *Intermountain Cases* (U. S. v. A. T. & S. F. Ry. Co.) 234 U. S. 476, has held that an absolute prohibition against charging more for the short than for the long haul does not violate the Federal Constitution.

The Supreme Court of the United States in the case of *Louisville & Nashville Ry. Co.,* v. *Kentucky,* 183 U. S. 503, held constitutional the long and short haul clause of the Kentucky Constitution, overruling the objections that it deprived the carrier of its property without due process of law and deprived it of the equal protection of the laws.

The clause in the Kentucky Constitution was substantially similar to Section 4 of the Interstate Commerce Act as it existed prior to the amendment of 1910. It contained the clause "under substantially similar circumstances and conditions." *However, the highest court of Kentucky held that this clause did not render the prohibition inapplicable where there was competition at the long haul point, thereby adopting a construction diametrically opposed to the construction placed upon Section 4 of the Interstate Commerce Act by the United States Supreme Court.* When this case came before the Supreme Court that Court considered the constitutionality of the provision of the Kentucky Constitution in view

of the construction placed upon it by the highest court of Kentucky. By this construction the clause quoted above was for all practical purposes eliminated. Referring to the constitutionality of the long and short haul clause the Supreme Court said:

> "To sustain these contentions the learned counsel for the plaintiff in error cite and rely upon those decisions of this court in which it has been held that, under pretense of regulating fares and freights, a State cannot require a railroad corporation to carry persons or property without reward, neither can it do that which in law amounts to the taking of private property for public use without just compensation or without due process of law; that the question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the reasonableness both as regards the company, and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination; and that if the Company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and that in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws. *Stone* v. *Farmers' Loan & Trust Co.,* 116 U. S. 307; *Chicago, Milwaukee & St. Paul Railway Co.* v. *Minnesota,* 134 U. S. 418; *Regan* v. *Farmers' Loan & Trust Co.,* 154 U. S. 362; *Smyth* v. *Ames,* 69 U. S. 466; *Lake Shore & Michigan Southern Railway Co.,* v. *Smith,* 173 U. S. 684.

"We certainly have no disposition to overrule or disregard cases so recently decided and so elaborately considered. And accordingly, if it appeared, in the present case, that the railroad commission had arbitrarily fixed rates of fare and freight, in respect to which the railroad company was given no opportunity to be heard, and which were confiscatory, and amounted to depriving the plaintiff in error of its property without due process of law, it would doubtless be our duty to furnish the relief asked for. *Nor, yet, are we ready to carry the doctrine of the cited cases beyond the limits therein established. For the Federal courts to interfere with the legislative department of the State government, when acting within the scope of its admitted powers, is always the exercise of a delicate power, one that should not be resorted to unless the reason for doing so is clear and unmistakable.*"

Further the Court said:

"*It is scarcely necessary to say that courts do not sit in judgment on the wisdom of legislative or constitutional enactments.* This is a general principle; but it is especially true of Federal courts when they are asked to interpose in a controversy between a State and its citizens. This court then is not concerned with the wisdom of the people of Kentucky when they declared in their Constitution that it should be unlawful for any person or corporation owning or operating a railroad in that State, to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance. Nor, as we have already seen, is it for us to say that the Court of Appeals

of Kentucky erred in so construing that enactment as to forbid a railroad company from justifying a voluntary disregard of its command by claiming that competition between its road and other modes of transportation created substantially dissimilar circumstances and conditions.

"It does not call for argument that railroad companies are incorporated to perform a public service, and that it is for the State to define their powers and control their exercise of such powers. The question for us, in the present case, is whether the State by enacting a rule of action for such companies, forbidding a greater rate of charges for a shorter than for a longer distance, and by establishing a railroad commission of the kind and with the functions disclosed in the Constitution and statutes, *deprives the plaintiff in error of its property without due process of law and denies to it the equal protection of the laws.*

"When the citizens of Kentucky voluntarily seek and obtain a grant from the State of a charter to build and maintain a public highway in the form of a railroad, it would seem to be evident that it takes, holds and operates its road subject to the constitutional inhibition we are considering, and are without power to challenge its validity. It may be that, in a given case, a railroad company may be able to show that the State has disabled itself from enforcing the provision by a contract previously made, and it may be that cases may arise in which the provision cannot be enforced because operating as an unlawful interference with commerce between the States. Indeed, those very positions are taken by the plaintiff in error in this case, and will receive our attention hereafter. *But, apart from such contentions, and looking only at the case of a company voluntarily formed to carry*

*on business wholly within a State, we are unable to see how such company can sucessfully contend that it can be exempted by the courts from the operation of the Constitution of the State.*

"It is said that, while it is true that railroad companies receive their rights to exist and to maintain their roads from the State, yet that their ownership of such roads is property, and, as such is protected from arbitrary interference by the State. But, though it be conceded that ownership in a railroad is property, it is property of a kind that is subject to the regulations prescribed by the State. We do not wish to be understood as intimating that if, hereafter, the railroad commission should fix and establish rates of a confiscatory character the company would be without protection which courts of equity have heretofore given in cases of that description. *What we now say is, that a State corporation voluntarily formed cannot exempt itself from the control reserved to itself by the State by its Constitution, and that the plaintiff in error, if not protected by a valid contract, cannot successfully invoke the interposition of the Federal Courts, in respect to the long and short haul clause in the State Constitution, on the ground simply that the railroad is property. Nor is there any foundation for the objection that the provision in question denies to the plaintiff in error the equal protection of the laws. The evil sought to be prevented was the use of public highways in such a manner as to prefer, by difference of rates, one locality to another, and the remedy adopted by the State was to declare such preferences illegal, and to prohibit any person, corporation or common carrier from resorting to them. That remedy included in its scope every one, without distinction, whose calling, public in its character, gave an opportunity to do the mischief which the State desired*

*to prevent.* The practical inefficiency of this remedy to reach the desired end, and the resulting injury to the welfare of both the producers and the consumers of an article like coal, when brought into competition with coal brought from without the State, are strongly urged on behalf of the plaintiff in error; but, however well founded such objections may be, they go to the wisdom and policy of the enactment, not to its validity in a Federal point of view. The people of Kentucky, if it can be shown that their laws are defective in their conception or operation, have the remedy in their own hands.

"It is further contended that the indictment and proceedings in this case were void, because of the nature of the proviso in section 218 of the Constitution. That proviso is in the following words: 'Provided, that upon application to the railroad commission, such common carrier, or person, or corporation, owning or operating a railroad in this State, may in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distances, for the transportation of passengers or property; and the commission may from time to time, prescribe the extent to which such common carrier, or person, or corporation owning or operating a railroad in this State, may be relieved from the operation of this section.'

"The argument is that 'even if it were proper to prohibit absolutely the charging of more for short than long hauls, yet where the law does not do so, but recognizes that there may be legitimate traffic which could thereby be interfered with, it is unconstitutional to entrust the dispensation of the right to engage in such legitimate traffic to a mere administrative tribunal, without any rules by which it may be guided, without specifying any conditions upon which the car-

riers shall be entitled to enjoy such legitimate traffic, and absolutely free to give or withhold its consent at its own pleasure or will in any and all cases, without judicial review of control.'

"But if it be competent for the State, as this argument supposes to wholly forbid, in every case and by every carrier, the charging of more for a short than a long haul, it is not easy to see why the State may not permit such charges through the action of a tribunal authorized to investigate the subject and to afford relief in cases deemed proper. Such a provision is *ex gratia,* and in the direction of exonerating the carrier from what the argument concedes to be a lawful limitation."

*As construed by the Kentucky courts the provision of the Kentucky Constitution was substantially the same as the provision of Section* 21 *of Article XII of our Constitution as amended October* 10*th,* 1911. It was an absolute prohibition against charging more for the short than for the long haul with the proviso that the Commission could in special cases after investigation relieve from the operation of the prohibition. Therefore the decision of the United States Supreme Court *is direct authority to the effect that the long and short haul clause of our Constitution as amended October* 10*th,* 1911, *does not violate the* 14*th Amendment; and by analogy it is authority to the effect that the inflexible long and short haul clause of the Constitution of* 1879 *is constitutional. Every argument contained in the opinion in Louisville & Nashville v. Kentucky, supra, that the clause of the Kentucky Constitution did not violate the Federal Constitution is equally applicable to the inflexible long and short haul clause of the Constitution of* 1879.

The clause of the Kentucky Constitution under consideration in *Louisville & Nashville Ry. Co.* v. *Kentucky, supra,* was substantially similar to Section 4 of the Interstate Commerce Act as it existed before the amendment of 1910. It contained the clause "under substantially similar conditions and circumstances," but the highest court of Kentucky had held that the circumstances were not dissimilar *merely because there was competition at the long haul point and that the prohibition applied notwithstanding such competition.* Therefore, as said by the Supreme Court, the constitutional provision of Kentucky amounted to an absolute prohibition with an *ex gratia* relieving clause. As construed by the Kentucky courts the clause of the Kentucky Constitution was for all practical purposes identical with the present Section 4 of the Interstate Commerce Act and with Section 21 of our Constitution as amended October 10th, 1911. It follows therefore that the decision of the Supreme Court *is direct authority to the effect that Section* 21 *as amended October* 10*th,* 1911, *does not violate the Fourteenth Amendment.* It is clear that every reason stated by the Supreme Court in the Louisville & Nashville case in support of the constitutionality of the clause of the Kentucky Constitution applies with equal force to the inflexible long and short haul clause of the Constitution of 1879. *If a prohibition with an ex gratia relieving clause does not deprive the carrier of its property without due process of law it follows conclusively that a prohibition without such relieving clause does not do so.*

In *Wabash, etc., Ry. Co.* v. *Illinois,* 118 U. S. 557, 564, the Supreme Court with reference to the inflex-

ible long and short haul clause of the Illinois Statute of 1871 said:

> *"If the Illinois statutes could be construed to apply exclusively to contracts for a carriage which begins and ends within the State, disconnected with a continuous transportation through or into other States, there does not seem to be any difficulty in holding it valid."*

Further the Court said (pg. 577):

> "Of the justice and propriety of the principle which lies at the foundation of the Illinois statute it is not the province of this Court to speak. As restricted to a transportation which begins and ends within the limits of the State it may be very just and equitable, and it certainly is the province of the State legislature to determine that question."

The power of the State over all persons within its jurisdiction is plenary, and in innumerable ways it may regulate the actions of such persons and restrict their freedom of contract. An inflexible long and short haul clause viewed from the Constitutional standpoint is no different from hundreds of other enactments restricting freedom of contract which have been sustained by the courts.

It is said that it prevents the carrier from carrying to the long haul point, because owing to competition at such point, unless it lowers its charge to that point below what is a reasonable rate to the short haul point it cannot obtain business. This may be freely granted but nevertheless the Constitutional rights of the carrier are not invaded. *The State has the undoubted right to prohibit a common carrier from engaging in that sort of competition. It has the undoubted right to forbid a common carrier to trans-*

*port property for less than a reasonable rate. But by the inflexible long and short haul clause the State has not gone to this extent. In effect it has merely enacted that the charge to the long haul point shall not be below a reasonable rate to such an extent as to make an equal charge to a less distant point non-remunerative.* It could have gone much further without invading any Constitutional right of the carrier.

A carrier has a constitutional right to a reasonable compensation for its services but it has no constitutional right to carry goods for less than a reasonable compensation. The State has the right to fix minimum as well as maximum charges and although a carrier can attack the maximum rate on the ground that it is so low as to be confiscatory, yet it has no constitutional ground of attack upon the minimum rate.

In *Bluefield* v. *N. W. Ry. Co.,* 22 I. C. C. 536, the Commission said with reference to the long and short haul clause of the Interstate Commerce Act:

> "The purpose of Congress seems to have been to keep alive competition at competitive points upon the theory probably that while injustice might in some instances result the general effect might be for the public good."

On the other hand it would appear that the policy of this State was in some cases to *restrict competition at competitive points upon the theory that while injustice might result in some cases the general effect would be beneficial.* Upon analysis the whole matter resolves itself into one of public policy.

The flat mileage rate held non-violative of the 14th Amendment by the United States Supreme Court in

the Minnesota Rate Cases (230 U. S. 352) is subject to every objection that can be made to an inflexible long and short haul clause.

The history of the 4th section of the Interstate Commerce Act shows that from the time the Act was first proposed in 1886 there were many members of Congress who favored an inflexible long and short haul clause. The Act to Regulate Commerce was first introduced in the Senate. When it went to the House Section 4 contained a flexible long and short haul clause. On July 30th, 1886, the House passed a substitute bill which amended Section 4 of the Senate bill so as to read as follows:

> "That it shall be unlawful for any person or persons engaged in the transportation of property, as provided in the first section of this Act to charge or receive any greater compensation for a similar amount and kind of property, for carrying, receiving, storing, forwarding, or hauling the same, for a shorter than for a longer distance, which includes the shorter distance on any one railroad; and the road of a corporation shall include all the road in use by such corporation, whether owned or operated by it under a contract, agreement, or leased by such corporation."
>
> *Re Southern Ry. & Steamship Assn.*, I. C. C. 287.

A conference committee was appointed and at the second session of Congress the committee agreed upon Section 4 in the form in which it was originally enacted in 1887. It will be noted that the bill as passed by the house contained an absolute prohibition against charging more for the short than for the long haul.

In the case of *Re Application of S. P. Co. for relief under the provisions of the fourth section,* 22 I. C. C. 366, 374, the Commissioners said:

> "If it is injurious to the interstate commerce of this country, and inimical to the public welfare, to permit its railroad highways to be used so as to unduly promote the growth and prosperity of one city as against another, by charging more to the nearer point, *it is within the proper sphere of Congress to prohibit absolutely and completely the pursuance of such policy by the railroads.* Congress, however, has not seen fit to do this. Out of consideration for the claims of the carriers, and out of respect for those policies under which our commerce has grown, Congress has permitted exceptions to be made to its general policy, when justification is shown therefor. It is not conceivable, however, that in the application of this government policy the carriers may be permitted to disregard any of the prohibitions of the law. It would seem, therefore, fundamental in the enforcement of the fourth section that a carrier shall make proof, not only of water competition, as in this case, but of the reasonableness of the rates applied to intermediate points."

Plaintiff in error complains that the long and short haul clause of the Constitution of 1879 "forces the adoption of a low competitive rate to a point where there is no competition, without a hearing or other adjudication of the reasonableness of the latter rate."

But the Constitution does not force the adoption of such low competitive rate to a point where there is no competition. The carrier is not forced to make the low rate to the more distant point. It is against the policy of the law to permit a carrier to charge an unreasonably low rate to a long haul point, for if this

is permitted there will always exist the temptation to make up for the loss thus incurred by charging an unreasonably high rate to other points where competition does not exist.

Plaintiff in error states that the Constitution affords no "hearing or other adjudication of the reasonableness" of the rate to the short haul point. As pointed out *supra,* the effect of our constitutional provision is to prevent a charge to the long haul point which is so low that an equal charge to a shorter distance will not afford a reasonable return upon the investment of the carrier. The provision is a declaration of the policy of the State with reference to carriers and is applicable to all alike. It does not purport or attempt to fix rates nor does it compel the adoption of any rate by the carrier. The long and short haul clause is a law regulating carriers, and is in principle identical with hundreds of other enactments regulating persons and occupations, which have been upheld as non-violative of the Federal Constitution.

Provisions similar to the long and short haul prohibition of 1879 are contained in the Constitutions of Idaho, Missouri, Montana, and Washington. The Constitutions of all of these States contain absolute prohibitions against charging more for the short than for the longer haul. The provision of our Constitution was adopted from a Pennsylvania statute which contained an absolute prohibition against charging more for transportation from Pittsburg to points between Pittsburg and Philadelphia than was charged from Pittsburg to Philadelphia.

In the *Intermountain Cases* (U. S. v. A. T. & S. F. Ry. Co., 232 U. S. 476) *supra,* decided on June 22nd,

1914, while the demurrer to the defendant's answer in this case was pending, the Supreme Court declined to depart from its decision in *Louisville & Nashville Ry. Co.* v. *Kentucky,* 183 U. S. 503, *supra,* holding long and short haul legislation constitutional. The Court said:

> "It is said in the argument on behalf of one of the carriers that as in substance and effect the duty is imposed upon the Commission in a proper case to refuse an application, therefore the law is void, *because in such a contingency the statute would amount to an imperative enforcement of the long and short haul clause and would be repugnant to the Constitution. It is conceded in the argument that it has been directly decided by this court that a general enforcement of the long and short haul clause would not be repugnant to the Constitution (Louisville & N. R. R. Co. vs. Kentucky,* 183 *U. S.* 503) *but we are asked to reconsider and overrule the case and thus correct the error which was manifested in deciding it. But we are not in the remotest degree inclined to enter into this inquiry, not only because of the reasons which were stated in the case itself,* but also because of those already expounded in this opinion and for an additional reason, which is that the contention by necessary implication assails the numerous cases which form the enactment of the Act to regulate commerce down to the present time have involved the adequacy of the conditions advanced by carriers for justifying their departure from the long and short haul clause. We say this because the controversies which the many cases referred to considered and decided by a necessary postulate involved an assertion of the validity of the legislative power to apply and enforce the long and short haul clause. How can it be otherwise, since if this were not the case all the issues presented in the numerous

> cases, would have been merely but moot, affording, therefore, no basis for judicial action since they would have had back of them no sanction of lawful power whatever."

After quoting from the decision of the Supreme Court in *Norfolk & Western* v. *West Virginia,* 236 U. S. 605, to the effect that the State may not select a commodity, and instead of fixing what may be deemed a reasonable compensation for its carriage, compel the carrier to transport it either at less than cost or for a compensation that is merely nominal, plaintiff in error makes the following statement:

> "This is precisely what the effect of the old Section 21, Article XII would be if it were given the inflexible operation contended for by defendant in error."

It is further stated:

> "In the first case—that of the old section—there is no process of law at all. The Constitution, according to defendant in error, used the through rate as a yard stick, no matter whether it might be reasonable or unreasonable at the intermediate point."

The above quoted statements are so palpably erroneous that at first we hesitated to make any reply to them. As already pointed out, the plaintiff in error was under no obligation to fix a rate to the more distant point which would be less than remunerative to the intermediate points. The policy of the law, as declared by the Constitution, was against a carrier attempting to meet rates at the more distant point where such attempt would result in the rates being so low as not to afford reasonable compensation for

less distant hauls. We are not concerned with the reasons that dictated this policy. In all probability the people deemed that the carriage of goods to the more distant point at cost or at less than a reasonable compensation for the service was likely to result in the carrier's making up the loss of profit thereby incurred by charging an unreasonably high rate to other points. The constitutional provision did not "compel" the plaintiff in error to transport to any point "either at less than cost or for a compensation that is merely nominal" and the decision in *Norfolk & Western* v. *West Virginia,* 236 U. S. 605, *supra,* can have no application. Where the plaintiff in error charged the less rate for the longer distance it did so voluntarily and with the knowledge that by so doing it fixed that rate as the maximum which it could lawfully charge to intermediate points.

It is said that under the old Section 21 "there was no process of law at all." It is respectfully submitted that plaintiff in error has a most unique conception of the meaning of the term due process of law.

The people enacted a prohibition equally binding on every one to the effect that carriers should not charge more for a shorter than for a longer distance over the same line in the same direction. The prohibition was in pursuance of the police power of the state, and applied equally to every person engaged in the occupation of a common carrier. Seemingly it is the contention of plaintiff in error that a carrier is entitled to its "day in court" before it was bound by the prohibition.

Referring to the statement in the opinion of the District Court to the effect that the Supreme Court

in *Louisville & Nashville Ry. Co.* v. *Kentucky,* 183 U. S. 503, and in the *Intermountain Cases,* 234 U. S. 476, had decided that an absolute long and short haul prohibition is not contrary to the Federal Constitution, plaintiff in error states:

> "We respectfully submit, however, that the learned District Judge was in error in two respects: first that the United States Supreme Court has never upheld the inflexible enforcement of a long and short haul clause—that is, an enforcement without any discretionary or relieving power being somewhere vested; and, second, that the provision of the Kentucky Constitution passed upon in 183 U. S. 503 is not substantially similar to the provisions of the old Section 21 of Article XII of the California Constitution."

Although we have already discussed this matter at some length, we will further examine the decisions in the *Kentucky case* and in the *Intermountain cases,* in order to see just what the Supreme Court did decide in this regard.

It is very certain that in the *Intermountain cases,* the Supreme Court was of the opinion that in the *Kentucky case* it had held constitutional an absolute prohibition against charging more for short than for the long haul, because, as shown by the quotation from its opinion, *ante,* it refused to reconsider its decision in the *Kentucky* case that *"a general enforcement of the long and short haul clause"* was not repugnant to the Constitution.

With reference to the contention of "one of the

carriers'' who was a party to the *Intermountain Cases* the Supreme Court said:

> ''It is said in the argument on behalf of one of the carriers that as in substance and effect the duty imposed upon the Commission in a proper case to refuse an application, therefore the law is void, because in such a contingency the statute would amount to an *imperative enforcement of the long and short haul clause* and would be repugnant to the Constitution.''

The adjective ''imperative'' is by the Standard Dictionary defined as follows:

> ''Expressive of or containing positive as distinguished from advisory or discretionary commands.''

The words ''general enforcement'' used by Mr. Chief Justice White mean nothing if they do not mean enforcement of an inflexible prohibition. *In fact it is most apparent both in the Kentucky case and in the Intermountain Cases that the Supreme Court was of the opinion that a prohibition with a relieving clause would not be constitutional unless the power existed in the legislature to enact an inflexible prohibition, so in both of these cases the Supreme Court directly held that an inflexible long and short haul clause was constitutional.* Nor were these decisions *obiter,* as in both cases it was assumed by the Court that the particular clauses there under consideration would be unconstitutional *unless there existed in the legislature the power to prohibit absolutely the charging of more for the shorter haul.*

In referring to the *Intermountain Cases* plaintiff in error makes no reference whatever to the portion

of the opinion quoted *supra,* but at page 69 of its brief quotes the following excerpt from the opinion:

> "But while the public power, so to speak, previously lodged in the carrier is thus withdrawn and reposed in the Commission, the right of carriers to seek and obtain under authorized circumstances the sanction of the Commission to charge a lower rate for a longer than for a shorter haul because of competition or for other adequate reasons is expressly preserved, *and if not is in any event by necessary implication granted.* And as a correlative the authority of the Commission to grant on request the right sought is made by the statute to depend upon the facts established and the judgment of that body in the exercise of a sound legal discretion as to whether the request should be granted compatibly with a due consideration of the private and public interests concerned, and in view of the Second and Third Sections."

After quoting the foregoing plaintiff in error states:

> "We take it, therefore, that in the Intermountain Cases the Supreme Court recognized the principle we contend for here, that any legislation which, without affording the carrier an opportunity of a day in court, establishes rates which are confiscatory or less than reasonable, or which ignore the compelling force of competition at the further point, operates to deprive the carrier of its property without due process of law."

The portion of the opinion quoted, it will be ob-

served, has no reference to the constitutional question, but relates solely to the construction of the Fourth Section under which the Commission was authorized to permit in special cases, after investigation, a lesser charge for the longer than for the shorter distance.

As said by Mr. Chief Justice White in the portion of the opinion quoted by plaintiff in error there can be no doubt that by the Fourth Section of the Interstate Commerce Act the Commission had power to sanction a higher rate for the shorter than for the longer haul. Resort need not be had to implication for the English language could not make it plainer. But what possible connection has this with the contention of plaintiff in error that the Supreme Court did not in that case hold that an absolute long and short haul prohibition was constitutional?

It is remarkable that any carrier should persist in this contention in view of the fact that it has been twice held invalid by the United States Supreme Court. It is indeed remarkable that the contention should ever have been made. There are cases where it is a close question as to whether or not a statute violates the Fifth or Fourteenth Amendments, but there never was a question here. It certainly would never be contended that a state could not prohibit discrimination in charges as between persons or places, yet the prohibition against charging more for the shorter than for the longer distance is merely a prohibition against a particular kind of discrimination.

**3. A PERSON WHO IS REQUIRED TO PAY MORE THAN THE LEGAL CHARGE FOR TRANSPORTATION OF FREIGHT HAS A COMMON LAW RIGHT TO RECOVER THE OVERCHARGE, AND IN ADDITION TO SUCH COMMON LAW RIGHT HAS THE STATUTORY RIGHT CONFERRED BY THE STATUTES OF 1909, 1911, AND THE PUBLIC UTILITIES ACT.**

The complaint in this case states a cause of action under the common law and also a cause of action to recover damages under the statutes of 1909, 1911, and the Public Utilities Act.

We will first reply to the contention of plaintiff in error that defendant in error has no cause of action "upon any common law theory."

Plaintiff in error cites *Cowden* v. *Pacific Coast S. S. Company,* 94 Cal. 470, in support of its contention that the plaintiff has no "common law" right of action. It may be conceded that at common law, that is, in the absence of a statutory or constitutional provision, the complaint in this case would not state a cause of action. The case of *Cowden* v. *Pacific S. S. Company, supra,* was an action involving a maritime contract which is governed by the Federal law. The objection was made that the Superior Court had no jurisdiction of the controversy, the contention being that jurisdiction was vested solely in a court of admiralty. Section 711 of the Revised Statutes of the United States saved to suitors the right of a common-law remedy when the common law was competent to give it. In order to sustain the contention that the courts of California had jurisdiction of the controversy, it was incumbent upon the plaintiff to show that the common law gave a right of action to recover against a carrier for charging more to one shipper

than to another for the same service, that is, for discrimination. The Supreme Court of California held, after a review of the authorities, that the common law gave no right of action to recover damages so sustained, although it was conceded that the common law gave a right of action for damages for charging an unreasonable rate. The decision was based upon the ground that discrimination was not forbidden by the common law.

But this decision does not support the contention of plaintiff in error that plaintiff has no cause of action to recover damages for a violation of the express prohibition of the Constitution. *In fact, the authorities therein cited clearly show that where a statute forbids the doing of an act, then the person damaged by the act so forbidden has a full and complete cause of action.* This must necessarily be so. A cause of action to recover damages for charging an unreasonable rate exists at common law, because at common law it was illegal to charge more than a reasonable rate. *So where by statute discrimination is made illegal, or where by statute the charging of more for a short than for a longer haul is made illegal, it follows, as a matter of course, that a corresponding right of action must exist.* It exists for the same reason that it existed in the case where the act was contrary to the common law, that is, because the act is illegal. Whether it is illegal by reason of the common law, that is, by immemorial usage and custom, or whether it is illegal because so declared by the law-making power is wholly immaterial. There can be no reason for any such distinction, and no court has ever recognized that such a distinction exists.

That a shipper has a cause of action against a

carrier in a case where the carrier discriminates against him and in favor of another shipper, is clearly held in the case of *Great Western Ry. Co.* v. *Sutton,* 4 Eng. & Ir. App. 236, upon which the decision in *Cowden* v. *Pacific Coast S. S. Co.,* 94 Cal. 470, *supra,* is based. In that case Mr. Justice Blackburn held that at common law a shipper had no cause of action in such a case, but that he had a cause of action in the case before the court, because of the existence of the Act of Parliament regulating railroads, *one of the clauses of which prohibited discrimination.* After referring to the "equality clause" of the Act, the Justice said:

> "I think it follows from this that if the defendants do charge more to one person than they, during the same time, charge to others, *the charge is, by virtue of the statute, extortionate. And I think the rights and remedies of a person made to pay a charge beyond the limit of equality imposed by the statute on railway companies acting as carriers on their line, must be precisely the same as those of a person made to pay a charge beyond the limit imposed by the common law on ordinary carriers as being more than was reasonable.* The mode of establishing that the demand is extortionate differs in the two cases. Where it is sought to prove that the charge is unreasonable, and therefore extortionate, the fact that another was charged less is only material evidence for the jury, tending to prove that the reasonable charge was the smaller one. When it is sought to show that the charge is extortionate, as being contrary to the statutable obligation to charge equally, it is immaterial whether the charge is reasonable or not; it is enough to show that the company carried for some other person or class of persons at a lower charge dur-

ing the period throughout which the party complaining was charged more under the like circumstances."

Justice Blackburn further said:

> "*The excess might be recovered back under a count for money had and received.*"

Referring to the case of *Garton* v. *Bristol,* 1 B. & S., 112, Justice Blackburn said:

> "*If, as rather appears from the report to be the case, the decision went so far as to say that an action for money had and received would not lie where the overcharge was in breach of the statutable obligation to charge equally, as much as if it had been in breach of the common law obligation to charge reasonably; I think the decision was a mistake; and it was overruled in Baxendale* v. *The Great Western Ry. Co.,* 16 C. B. (N. S.) 137, by the Court of Exchequer Chamber which comprised three out of the four judges who took part in deciding *Garton* v. *The Bristol and Exeter Ry. Co.,* in the Queen's Bench."

The decision of Justice Blackburn was affirmed in the House of Lords. Lord Chelmsford, in delivering an elaborate opinion said:

> "The last subject to be considered is the form of the action; whether an action *for money had and received will lie to recover back overcharges made upon the carriage of the plaintiff's goods, not absolutely but relatively to the charges made to other persons.* It was argued for the defendants that the charge upon the plaintiff's packed parcels, being warranted by the 10 and 11 Vict., ch. 226, and being reasonable, and within the absolute discretion of the company, the plaintiff was not injured by other

persons being charged less than he was. *But this is a fallacious way of viewing the question. The plaintiff's complaint is not that others are charged less than himself, but that the fact of their having been charged less entitled him to claim the same rate of charge, and that all beyond that rate is overcharge.* The very fact of the smaller charge to others is the ground of his complaint of an overcharge to himself. Now, if the defendants were bound to charge the plaintiff for the carriage of his goods a less sum, and they refused to carry them except upon payment of a greater sum, as he was compelled to pay the amount demanded, and could not otherwise have his goods carried, *the case falls within the principle of several decided cases, in which it has been held that money which a party had been wrongfully compelled to pay under circumstances in which he was unable to resist the imposition, may be recovered back in an action for money had and received.*"

By Section XC of the Railway Consolidation Act of 1845 (8, 9, Victoria pg. 251), *supra,* in which Act all existing statutes relating to railways were consolidated, it was provided:

"That all tolls be at all times charged equally to all persons, and after the same rate, whether per ton per mile or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances; and no reduction or advance in any such tolls shall be made directly or indirectly in favor of or against any particular person or company traveling upon or using the railway."

The Act of Parliament merely declared discrimination unlawful; it did not purport to give any cause of action to persons injured by the violation of the Act. That such cause of action existed necessarily followed from the declaration that discrimination was unlawful.

*Great Western Ry. Co.* v. *Sutton, supra,* is in principle identical with the case at bar, and conclusively disposes of the contention that plaintiff had no cause of action upon "any common law theory." Plaintiff in error has expended much labor in an endeavor to show that plaintiff has no *common law* right of action; but has entirely lost sight of the fact that whether the cause of action is based upon a violation of the common law or upon a violation of statutory law, is wholly immaterial.

At page 75 of the brief of plaintiff in error it is said that an action for money had and received will not lie "since the carrier is prohibited by Section 22 of Article XII of the Constitution, as it existed both before and after the amendment of October 10, 1911, and by the provisions of both the Wright and Eshleman Acts and the present Public Utilities Act, on pain of severe penalties from paying rebates or drawbacks from its published rates."

It must be apparent that the provisions of the Constitution and statutes against rebates can have no application to a claim for money illegally exacted by a carrier from a shipper. *A rebate is a drawback paid to a shipper by means of which the shipper secures the transportation* of his freight for less than the legal rate. Analyzed, this contention of plaintiff in error is: That the rates collected may be unconstitutional and illegal because they violate the Con-

stitution, yet plaintiff in error cannot refund the amount by which they exceed the legal rate because such refund would be a rebate. But it is apparent that *a rebate is a drawback from the legal rate and not the refund of an overcharge.*

After making the statement quoted above plaintiff in error further states:

> "Therefore an action upon a common count as and for money had and received will not lie since it was not only not the duty of the carrier to restore the money but on the contrary was its duty not to restore it."

We maintain that an action upon a common count for money had and received will lie for the reason that the carrier committed an unlawful act in receiving the illegal charge and that it is its positive duty to restore to the shipper the amount by which the charge collected exceeded the charge that the carrier was legally entitled to make.

*Plaintiff in error's own argument shows that plaintiff has an action upon a common count for money had and received to recover these illegal charges, for its sole argument against the existence of such cause of action is based upon the palpably unfounded claim that the refund of an illegal charge constitutes a rebate.*

The action in which was rendered the judgment reviewed in *Louisville & Nashville R. R. Co.,* v. *Eubank,* 184 U. S. 27, was to recover the difference between the rate charged the plaintiff for the short haul and the lower rate charged for the longer distance. Apparently it was never questioned that the plaintiff was entitled to recover, provided the long

and short haul provisions of the Kentucky Constitution applied to the facts of that case. The Supreme Court held that they could not constitutionally apply because the long haul point was in another State.

In one sense the right of action here may not be a common law right of action, that is, it may not be an action which could have been maintained at common law for the reason that the charging of more for the short than for the long haul may not have been forbidden by the common law; but in another sense it is a common law right of action, that is, it is founded upon the common law principle that a person who is required to pay to a carrier more than the legal charge is entitled to maintain an action to recover the overcharge.

In the debate before the Constitutional Convention of 1879 Mr. Howard, with reference to the objection that Sections 21 and 22 (then Sections 19 and 20) furnished no remedy, said (pg. 563):

> "Nay, more, sir; it is provided that any private party injured may also sue the railroad, and the result would be that if it discriminated between places, managing them unjustly, *that if it charged more for a short distance than for a long one on the same line, the party might pay under protest and sue the company for a return of the money and his damages.* Therefore it is a misstatement, or a gross misunderstanding of that section, to say that it furnishes no remedy. Nobody knows better than the learned gentleman from Sacramento, that a private party who is injured could pay under protest and bring his action for a return of the money and damages."

In *Twells* v. *Pa. R. R. Co.,* 2 Walker 650 (3 Am. Law Reg. N. S. 728), which was a bill in equity to

enjoin the carrier from charging more for the transportation of oil from Pittsburg to Philadelphia than the carrier charged for transporting oil from other shippers to Philadelphia where its ultimate destination was New York. The injunction was granted and the carrier was required to account to the plaintiff for the difference between the rates charged him to Philadelphia and the low rates given to other shippers who shipped through Philadelphia to New York. This decision was by the Supreme Court of Pennsylvania, although it was not reported in the official reports of that court. In citing the case, the United States Circuit Court for the District of Colorado (15 Fed. 656), said that it was undoubtedly authoritative, as it was cited by the Supreme Court in later cases.

*Central Iron Works* v. *Pennsylvania R. R. Co.,* 17 Pa. Co. Ct. 651, was a suit in equity to enjoin the carrier from charging more for the short haul. It appeared that plaintiff had already brought an action at law to recover for the overcharges theretofore made. It was held that equity had jurisdiction and that the pendency of the action at law was no defense.

It appears that Section 3 of Article XVII of the Pennsylvania Constitution (from which the prohibition of Section 21 of our Constitution was taken) was adopted from an Act of the legislature of Pennsylvania (March 7, 1861, P. L. 88), which provided that the local rates from Pittsburgh to stations intermediate between Pittsburgh and Philadelphia, should at no time exceed the rate to Philadelphia (*Central Iron Works* v. *Penn. R. R.,* 17 Pa. Ct. 652).

After referring to this Act and to the cases where

actions in assumpsit had been sustained, the court in *Central Iron Works* v. *Pa. R. R., supra,* said:

> "From these cases it is manifest that under this Act *there was concurrent jurisdiction by action at law or bill in equity,* and we can see no reason why this is not so under the clause of the Constitution in question, which is, as we have seen, the same in substance as the Act of 1861."

Plaintiff in error states that no "remedy" is provided by the constitutional provision and consequently charges exacted in violation thereof cannot be recovered. It is said (pg. 78):

> "If it (the statute) does not prescribe a remedy and no remedy exists under the common law or under another statute, an individual injured by a violation of the statute has no right of action."

In support of this contention plaintiff in error cites the case of *Ward* v. *Severance,* 7 Cal. 126. In this case a statute forbade the establishment of a ferry within a mile of a duly licensed ferry, and provided that any person establishing a ferry should be guilty of a misdemeanor. The defendant, who so established a ferry, was sued for damages by the owner of another ferry within a mile. In this class of cases it would seem clear that no civil action for damages lies; although the Court said that its conclusion was strengthened by the fact that a former act providing a remedy by a civil action had been repealed.

The next case cited, viz.: *Savings Association* v. *O'Brien,* 51 Hun. 45, is direct authority in support of defendant in error's position that a cause of action does exist. In that case the court had under consid-

eration a statute imposing liability on stockholders of corporations. The court said:

> "*A general liability created by statute without a remedy may be enforced by a common law action,* but where the provision for the liability is coupled with a provision for a special remedy, that remedy and that alone must be employed."

The quotation from *Young* v. *Kansas City, Etc., Ry. Co.,* 33 Mo. App. 509 (page 81 of brief), where the court said: "The legislature has revised the whole subject of the carrying of freight, and has evidently intended that the provisions of the statute shall be a substitute for the common law," is also direct authority to the point that the prohibition against charging more for the short than for the long haul stands on the same footing as does the common law prohibition against unreasonable rates; and that a similar remedy exists in the case of its violation.

In the case of *Mack* v. *Wright,* 180 Pa. St. 472, cited by plaintiff in error, a statute made it the duty of persons constructing buildings to cover the floor joists so that laborers would not fall from one floor to another. The statute also imposed a penalty for the violation of this statute. The court held that no person injured by a violation of the statute had a cause of action for damages because it was to be supposed that if the legislature had intended that a party injured by a violation of the statute should have a right of action it would have said so, in view of the fact that the statute did give a remedy to the State to recover a penalty for such violation. If the penalty had not been provided for, it is quite clear that the court would have held the plaintiff entitled to recover.

*Janney* v. *Buell,* 55 Ala. 408, also gives no support to the contention of plaintiff in error, but does support the position of defendant in error. After referring to the principle that at common law there was an appropriate remedy for the enforcement of every right, the court said:

> "But this principle applies only to common-law rights and does not extend to rights created by statutes, *for the enforcement of which the statute itself provides a specific though inadequate remedy.*"

In the case at bar the constitutional provision did not provide a specific remedy.

Plaintiff in error cites the case of *Fielders* v. *N. J. St. Ry. Co.,* 68 N. J. L. 343. In this case the court considered the effect of an ordinance regarding street railway corporations to keep in repair the part of the street adjacent to their tracks, and providing that if they did not do so the city might do so and the company should pay the cost. A traveler injured by reason of a defective sidewalk sued the city for damages. In holding that he had no cause of action the court said:

> "We find running through the adjudicated cases a rule of construction almost universally adopted, that where the provisions of an ordinances are intended, *not for the benefit or protection of individuals comprising the public, but for the benefit of the municipality as an organized government,* and more particularly if they impose upon property owners the performance of a part of the duty of the municipality to the public, a legislative intent is indicated that a breach of such ordinance shall be remedial only at the instance of the municipal

> government or by the enforcement of the penalty prescribed therein; and that there shall be no right of action to an individual citizen especially injured in consequence of such breach."

And in *Taylor* v. *Lake Shore, Etc., Co.,* 45 Mich. 74, also cited by plaintiff in error, which was a similar case, the court said:

> "For *if it was only a public duty* it cannot be pretended that a private action can be maintained for a breach thereof."

In *Heeney* v. *Sprauge,* 11 R. I. 456, next cited, a municipal ordinance required the removal of snow from the sidewalk by the owners of adjoining premises. Plaintiff was injured by falling on the sidewalk due to the fact that the snow had not been removed. In holding that such person had no cause of action against the property owner the court said:

> "The defendant has not done anything injurious to others which she was forbidden to do; she has simply left undone something beneficial to others which she was not required to do under a penalty in case of default."

But in this case the plaintiff in error has done something injurious to defendant in error's assignors which it was forbidden to do. The defendant has charged a higher rate for the shorter distance and this it was expressly forbidden to do by the Constitution.

In the following cases the courts held that a shipper who paid more for the shorter distance than the carrier charged for the longer distance, in violation of a prohibition similar to that contained in our Constitution was entitled to recover the difference be-

tween the charges paid by him and the lesser charge to the more distant point:

*Louisville & N. Ry. Co.* v. *Walker,* 63 S. W. 20 (110 Ky. 961).
*Hutchinson* v. *R. R. Co.,* 57 S. W. 25 (Ky.).
*Junod* v. *C. & N. W. Ry Co.,* 47 Fed. 290.
*Osborne* v. *C. & N. W. Ry. Co.,* 48 Fed. 49.
*Twells* v. *Penn. R. R. Co.,* 2 Walker 650 (2 Am. Law Reg. N. S. 728 (Penn. Supreme Court).

In *Twells* v. *Penn. R. R. Co., supra,* the greater charge for the shorter haul was held contrary to the common law and the shipper who paid it held entitled to recover the difference between such charge and the lesser charge made for the longer haul.

The cases in the 47th and 48th Federal Reporter were reversed by the Circuit Court of Appeals in 52 Fed. 912, on the ground that the evidence showed no violation of the 4th section of the Act, but the instructions as to the measures of damages given by the Circuit Court were not questioned.

In *Louisville & Nashville R. R. Co.,* v. *Eubank,* 184 U. S. 21, it was assumed that such was the proper measure of damages.

*Louisville & N. Ry. Co.,* v. *Walker,* 110 Ky. 961, *supra,* was an action to recover the difference between the charge made for the short haul and the lesser charge made for the longer haul. In holding that the plaintiff was entitled to recover, the Supreme Court of Kentucky said:

> *"If a carrier charges a shipper more than the law allows him to charge, the excess so paid may*

*be recovered by the shipper. If there had been a statute fixing the charge from Cave City to Louisville at* 20 *cents and appellant had charged* 29 *cents the excess so paid above the legal rate might be recovered, on the ground that it had been illegally exacted.*

Further the court said:

*"As one means of protecting the local shipper, this section fixed a maximum limit, beyond which he should not be charged. It was thus made unlawful for the carrier to charge a greater compensation for the same service for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance. When the charge for the longer haul is fixed, to charge more for the shorter haul is as clearly illegal as it would be to charge a greater sum than the law allowed where the law itself fixed a sum certain as the limit of the charge.* The carrier is allowed by the Constitution to fix the rate for the longer haul, but when he so fixes it this rate is the limit, beyond which he cannot go in charging for the same service in the shorter haul. *And, when appellant exacted of appellee more than it could legally charge, his right to recover the excess so paid is precisely similar to the right to recover for any other illegal exaction. He whose money is taken from him illegally is to that extent damaged. It is not necessary for appellee to show anything more than that he was compelled to pay more than appellant had a right to charge.* To illustrate: If it had been provided by statute that appellant should charge no more for hauling tobacco than it charged for hauling other like freight, and appellant, while charging 20 cents a hundred for hauling like freight, had charged appellee 29 cents a hundred for hauling his tobacco, it would be clear that the 9 cents a hundred had been taken from appellee in violation

of law, and it would be no defense for appellant to say that appellee was not prejudiced by its giving lower rates to other freight, and it did not hurt him in any way that other people were charged less than they ought to have been charged; for in such a case the excessive charge for carrying the tobacco would be illegal."

*Junod* v. *Chicago & N. W. Ry. Co.*, 47 Fed. 29, *supra,* was also an action to recover the difference between the amount charged for the short haul and the lesser charge made for the longer distance. The action involved interstate shipments. At the time the shipments moved the Fourth Section of the Interstate Commerce Act contained the clause "under substantially similar circumstances and conditions." In charging the jury the Court said:

"The question, therefore, for determination is this: Are you satisfied from the evidence in the case that the defendant railway company did in fact, between the dates named, have a tariff rate in operation, either its own tariff or by arrangements made with other roads, *whereby it undertook the transportation of grain and corn from Blair and other points in Nebraska, to Chicago, Ill., or other eastern points, at a rate less than it was charging for the like service to the shippers at Carroll, Iowa, that being a point upon its main line through which these shipments were made from Nebraska, to points east?* The duty and obligation placed by the law upon the railway company is that it shall not give any undue preferance or advantage to any person or persons; that it shall not give undue preference to one locality over other localities; that it shall not discriminate between the rates that are furnished Nebraska shippers and the rates from Iowa points. Of course, when we speak of undue preferance or undue discriminations, these questions

must be viewed with reference to all the circumstances that surround the transaction. *It must appear that it is for the like services, and under similar circumstances or otherwise the mere difference in the rate would not necessarily show that an undue preference was given.* Assuming that you will find under the evidence that there was a tariff rate put in operation and effect by the defendant railway company from Blair and other points in Nebraska, by which corn and oats were in fact shipped at a rate substantially of 11 cents from Blair—for instance, to Chicago, Ill., —*is there or is there not anything shown in the case that would justify you in finding that there was any circumstance or circumstances that would justify the company in charging the increased rate for doing the same kind of business* —that is, shipping corn and oats—at the same time, from Carroll, Iowa, to Chicago, Ill., than for parties shipping from Blair and other points in Nebraska? Now, as I understand it, Carroll, Iowa, is a point nearer to Chicago, Ill., and other eastern points, than is Blair, Neb.; the kind of property forwarded is of the same nature; the distance that is passed over in going from Carroll, Iowa, is less than the distance that would be passed over in going from Blair, or other points in Nebraska to Chicago, Ill., or other eastern points. Is there, therefore, anything shown in the evidence that would show such a dissimilarity in the circumstances, or in the work done, or in the property that was being forwarded, that would authorize you in finding that the company was justified in charging the larger rate for making transportation from Carroll, Iowa—the shorter distance—to Chicago, Ill., and other eastern points, than the rates charged from Blair and other points in Nebraska? *If there is no evidence to show any dissimilarity in these particulars then of course, there is nothing that would justify you in finding that the company was excused*

*from the effect of this larger rate that was put in force upon the grain or property forwarded from Carroll, Iowa, as compared with that charged for grain forwarded from Blair and other points in Nebraska."*

The court further said:

"If a party, under the law, is entitled to have the same rate,—that is, if the shipper at Carroll, Iowa, was entitled to have the same rate charged him for the forwarding of his property from Carroll, Iowa, to Chicago, Ill., as the shipper at Nebraska, and he was charged more—*the damage to him is the difference between the rates that he was thus called upon to pay and the lesser rate charged the Nebraska shipper. If the tariff rate from Blair and other points in Nebraska was* 11 *cents and the plaintiffs had to pay* 19 *cents; if, under the law, as I have instructed you, the duty and obligation was on the railway company to give the benefit to the shippers at Carroll, Iowa, of the same rate—of an equal rate with that given to the shippers from Blair and other points in Nebraska—you see the damage to the parties who have been compelled to pay this higher rate is the difference between that and the lesser rate."*

Statutory Right of Action

*Not only does the complaint in this action state a cause of action at common law—to recover an overcharge, but it also states a cause of action for damages under the Act of* 1909, *the Act of* 1911 *and the Public Utilities Act.*

The statute of 1909 (Stats. 1909: 499) was effective between March 19th, 1909, and February 9, 1911. The Act of 1911 (Stats. 1911: 13) was effective between February 9, 1911, and March 23, 1912. The Public Utilities Act (Stats. Extra Session 1911: 18) became effective March 23, 1912. The Act of 1909 is

sometimes called the "Wright Act," and the Act of 1911 the "Eshleman Act," but we will here refer to them as the statutes of 1909 and 1911, respectively.

Some of the causes of action stated in the complaint accrued while the statute of 1909 was in force, some while the statute of 1911 was in force, and the remainder while the Public Utilities Act was in force. It will be unnecessary to segregate them, however, as the provisions of all three statutes conferring a right of action for damages are practically identical.

The Public Utilities Act *expressly* provides that if any carrier shall do any act forbidden or declared to be unlawful by the Constitution it shall be liable to the person damaged thereby for all loss, damages, or injury sustained by such person. And that an action to recover such loss, damage, or injury may be brought in any court of competent jurisdiction. These provisions are contained in Section 73 (a), which reads as follows:

> "Sec. 73. (a) In case any public utility shall do, cause to be done or permit to be done *any act, matter or thing prohibited, forbidden or declared to be unlawful,* or shall omit to do any act, matter or thing required to be done, *either by the Constitution, any law of this State or any order or decision of the Commission, such public utility shall be liable to the persons or corporations affected thereby for all loss, damages or injury caused thereby or resulting therefrom,* and if the court shall find that the act or omission was willful, the court may in addition to the actual damages award damages for the sake of example and by way of punishment. *An action*

*to recover for such loss, damage or injury may be brought in any court of competent jurisdiction by any corporation, or person."*

*The corresponding sections of the Acts of* 1909 *and* 1911 *do not expressly refer to violations of the Constitution but both acts contain express provisions declaring discrimination unlawful whether between persons or places, and both acts confer a right of action for damages upon any person damaged by discrimination.*

The provisions of the Act of 1909 declaring discrimination unlawful are contained in Section 34, which reads as follows:

> "Sec. 34. It shall also be unjust discrimination for any such transportation company to make or give any undue or unreasonable prefcrance or advantage to any particular person, company, firm, corporation, or locality, or to any particular description of traffic, in any respect whatsoever, or to subject any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or in particular description of traffic to any undue or unreasonable prejudice of disadvantage in any respect whatsoever."

The provisions of the Act of 1911 prohibiting discrimination are contained in Sections 22 and 41. Section 22 is as follows:

> "If any railroad or other transportation company, subject hereto, shall directly or indirectly, by any special rate, rebate, drawback, or other practice, method or device, charge, demand, col-

lect, or receive from any person, company, firm or corporation, a greater, less or different compensation for any service rendered or to be rendered by it in the transportation of passengers or freight, than it charges, demands, collects or receives from any other person, company, firm or corporation, for doing a like service in the transportation of a like kind of traffic, such railroad or other transportation company shall be deemed guilty of discrimination, and it shall also be discrimination for any such railroad or other transportation company to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or to any particular person, company, firm, corporation or locality, or to any particular description of traffic in any respect whatsoever, or to subject any particular description of traffic of any particular person, company, firm, corporation or locality, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, and it shall also be discrimination for any railroad or other transportation company, or any officer or agent of any railroad or other transportation company to charge, collect, demand, or receive from any person, firm or corporation, a greater, less or different compensation established as in this act provided, and in so far as such discrimination shall be in violation of any order or orders of the commission, it shall be a contempt of said commission, and any railroad or other transportation company or officer or agent thereof practicing or permitting such discrimination, shall be punishable by the commission for such contempt in the same manner and to the same extent as contempts are pun-

ishable by courts of record, and such railroad or other transportation company practicing such discrimination, shall also be punishable by a fine not exceeding five thousand dollars for each offense, and every officer, agent or employee of such railroad or other transportation company practicing or permitting such discrimination shall be guilty of a misdemeanor and on conviction thereof shall be punished by a fine not exceeding one thousand dollars, or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment."

Section 41 of the Act of 1911 is as follows:

"It shall be unlawful for any person, persons, or corporations to offer, grant, or give or to solicit accept or receive any rebate, concession or discrimination in respect to the transportation of any property in this state whereby any such property by any device whatever shall be transported at a less rate than that stated in the rates made and established by the commission, *or whereby any other advantage is given or discrimination is practiced.* Every person or corporation, whether railroad or other transportation company or shipper, who shall, knowingly, offer, grant or give, or solicit, accept, or receive any such rebate, concession or discrimination shall be guilty of a misdemeanor and on conviction thereof shall be punishable in like manner and to the same extent as herein prescribed for discrimination."

The provisions of the Act of 1909 conferring a statutory right of action for a violation of the Act are contained in Section 38, which reads as follows:

"Sec. 38. *In case of any transportation company subject to this act,* or any person or corporation within the provisions hereof, *shall do, cause to be done, or permit to be done, except unintentionally or innocently through a mistake of fact, any matter, act or thing in this act prohibited or declared to be unlawful,* or shall similarly omit to do any act, matter or thing herein required by this act to be done, *such transportation company,* person or corporation *shall be liable to the penalties hereinbefore provided for, and shall, in addition, be liable to the person or persons, firm or corporation injured by such act or omission for the damages proximately resulting therefrom;* and in addition to such damages, such transportation company, in all cases where the same shall be guilty of extortion or unjust discrimination as defined in this act, shall pay to such person, firm or corporation so injured a penalty of not less than five hundred dollars and not more than five thousand dollars."

The corresponding provisions of the Act of 1911 are contained in Section 43, and are as follows:

"Sec. 43. In case any railroad or other transportation company subject to this act *shall do, cause to be done, or permit to be done any matter, act, or think in this act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing herein required to be done by it, such railroad or other transportation company shall be liable to the person or persons, firm or corporation injured thereby for the damages sustained in consequence of such violation."*

From the foregoing it is very clear that both the

Acts of 1909 and 1911 declared discrimination unlawful, and conferred a right of action for damages upon any person injured thereby.

*The charging of more for the short than for the long haul is merely a specific kind of discrimination.* The long and short haul prohibition of Section 21 of Article XII of the Constitution (both in the original section and in the section as amended October 10, 1911) immediately follows the general prohibition against discrimination.

*As the Acts of* 1909 *and* 1911 *were enacted in pursuance of the Constitution, and as all their provisions are controlled by the constitutional provisions, the provisions of the Acts prohibiting discrimination or preferences as between persons and localities must be construed to prohibit what the Constitution forbids. To hold otherwise would be to violate a cardinal rule of statutory construction.*

*The charging of more for the short than for the long haul is discrimination. That the charging of more for the short than for the long haul is discrimination* was held by the Appellate Court for the Second Appellate District in the very recent case of *Southern Pacific Company* v. *Superior Court of Kern County* (20 Cal. App: Dec. 674, 680), where the Court said:

> "It should be kept in mind that Sec. 21 of Art. XII of the Constitution, both before and after the amendment of Oct. 10, 1911, contains a prohibition against discrimination in charges between places, *and that the so-called long and short haul clause, following the general prohibition against discrimination, is a particular application of the rule as first stated in general terms.*"

In *Southern Pacific* v. *Superior Court of Kern County,* 50 Cal. Dec. 36, the Supreme Court denied a rehearing after decision by the District Court of Appeal.

In view of these decisions of the California courts, it is somewhat superfluous to cite additional authorities. However, the Courts have uniformly so held.

In *Chicago & Alton R. R. Co.* v. *People,* 67 Ill. 11, the Court, in considering the constitutionality of the Illinois Statute of 1871, one of the clauses of which provided that no railroad should charge greater compensation for freight over any portion of its road than it charged for the transportation of freight over any other of equal length, said:

> "If, then, an unjust discrimination is not to be permitted as between individuals in regard to freights, is it any more permissible as between different communities or localities? We are wholly at a loss to discover the slightest difference in reason or principle. If a farmer, living three miles from the Springfield station upon this company's road, is charged fifteen cents per bushel for shipping his corn to Chicago, is it just that the farmer who lives twenty miles nearer Chicago should be charged a higher sum? Certainly not, unless the railway company can show a peculiar state of affairs to justify the discrimination, and this must be something more than the mere fact that there are competing lines at one point and not at the other. The discrimination, in such a case, is as much a discrimination between individuals as it would be in reference to two persons living in the same locality, and shipping at the same station, unless, as before stated, a satisfactory reason can be given for discrimination between the points of

shipment, and such a reason, in the case supposed, it is not very easy to conceive.

"So, too, in the case before us. The resident of Bloomington who sends to Chicago for a car of lumber, is charged by the company at the rate of five dollars per thousand feet for transportation. The resident of Lexington, who orders the same lumber at the same time, is charged five dollars and sixty-five cents per thousand feet for a transportation sixteen miles less in distance. Is there not here, unless an explanation can be furnished by the company, an unjust discrimination between individuals, quite as much within the prohibition of the principles of the common law as would be an unjust discrimination between individuals of the same town?"

The case of *Chicago & Alton R. R. Co.* v. *People,* 67 Ill. 11, *supra,* was cited in the Constitutional Convention of 1879, in the debate upon Section 21 of Article XII of the Constitution.

The plaintiff in error does not contend that the charging of more for the shorter than for the longer distance is not discrimination, but to contrary affirms that it is discrimination. In the argument made at page 32 of its brief in support of the contention that the long and short haul clause in terms sought to regulate interstate commerce, the statement is made that "the section is one prohibiting discrimination," and at page 39 it is said, "We think the section should be construed as an entirety, as an effort to forbid discrimination."

From the foregoing it follows:

(a) *That the Statutes of* 1909 *and* 1911 *prohibit discrimination of all kinds.*

(b) *That the charging of more for the shorter than for the longer distance is discrimination.*

(c) *That the Statutes of* 1909 *and* 1911 *confer a right of action for damages upon any person injured by such discrimination.*

(d) *That the Public Utilities Act expressly confers a right of action for damages upon any person injured by a violation of the prohibition against charging more for the shorter than for the longer distance.*

At page 75 of the brief of plaintiff in error the following statement is made:

> "The complaint contains no allegation of general or special damage and no proof of any general or special damage was offered or admitted."

*The complaint states the facts from which it follows as a matter of law that damage has resulted. The fact and measure of damage both conclusively appear from the complaint. No evidence in support of these allegations were necessary as they were admitted by the answer.*

Discrimination under the Interstate Commerce Act and under the laws of California may or may not involve a prior determination by the Commission. And where discrimination is proved the measure of damages may or may not be fixed as a matter of law. Whether or not resort need be first had to the Commission depends upon the nature of the discrimination, and whether or not the measure of damage appears from proof of discrimination depends likewise upon the nature of the discrimination proved.

*Robinson* v. *B. & O. R. R. Co.*, was a case involving a species of discrimination where it was incumbent upon the plaintiff to first obtain a determination of the Commission that the act complained of amounted to discrimination. The alleged discrimination consisted in charging plaintiff 50 cents more per ton for the transportation of coal loaded into the cars from wagons than defendant charged for such transportation where the coal was loaded from tipples. Defendant's tariffs specified this difference in rates on coal loaded from wagons and tipples.

On the other hand the case of *Penn. R. R. Co.* v. *International Coal Co.*, 230 U. S. 184, involving discrimination by giving another shipper the benefit of a lower rate for the same service than was charged the plaintiff, was not a case where it was necessary that there should be any prior determination by the Commission as the statute itself made the act unlawful and no rate-making question was involved.

With reference to the measure of damages the case of *Penn. R. R. Co.* v. *International Coal Co., supra,* was a case where the measure of damages caused by the discrimination did not appear upon proof of the discrimination. As pointed out by the Supreme Court, the charging of some other shipper less than the lawful rate did not entitle the plaintiff to have its property transported for the same unlawful rate. In replying to the contention of the plaintiff that the common law measured the damages in such a case by the difference between the lawful rate paid by the plaintiff and the unlawful rate accorded another shipper, the Supreme Court said:

> "We are cited to no authority which shows that there was any such ancient measure of dam-

ages and no case has been found in which damages were awarded for such discrimination."

In the case at bar, however, the measure of the plaintiff's damage conclusively appears from the fact of the discrimination, for the plaintiff's assignors were charged an unlawful rate and the law in terms provided what the lawful rate should be. It was a mere matter of calculation to determine the amount of the damage. Possibly a person required to pay more than the lawful rate may be damaged beyond the extent of the difference between the lawful and the unlawful rate, but if he were, such special damages would have to be pleaded and proved. In any event the measure of his damage was at least the difference between the unlawful rate charged and the lawful rate which should have been charged.

It is not contended by plaintiff in error that the complaint should state the conclusion that plaintiff was "damaged." It is conceded that "a statement of the fact from which the Court will imply general damage" is sufficient. (Brief, page 75.)

The contention of plaintiff in error that the complaint does not state a cause of action for damages under the Statute is based upon a misapplication of the decisions of the Supreme Court of the United States and the other Federal Courts in construing the Act to Regulate Commerce, Section 8 of which is practically the same as the above quoted provisions of the California Statutes.

The first case cited is *Knudsen & Co.* v. *Michigan Central Ry.,* 148 Fed. 969, 974. In that case the Circuit Court of Appeals for the Eighth Circuit, as appears from the excerpt from its opinion quoted at page 87 of the brief of plaintiff in error, stated:

> "To support a recovery under this Section (Section 8) there must be a showing of some pecuniary injury. A cause of action does not necessarily arise from those acts or omissions of a common carrier that may subject it to a criminal prosecution by the Government. * * * He must show, either that there has been some unreasonable or excessive charge imposed, or some unlawful discrimination practiced against him."

Referring to the evidence in the case, the Court said:

> "It does not appear that any discrimination of any kind or character was practiced against it (the plaintiff)."

In *Knudsen & Co.* v. *M. C. Ry.*, 148 Fed. 969, *supra*, the plaintiff sought to recover certain sums paid the carrier for icing in transit carloads of fruit shipped by the plaintiff. The Court held that the second-class rate specified in the schedules (under which the shipments moved) applied to many commodities not moved under refrigeration, and did not include compensation for the icing of cars containing fruit which did require refrigeration.

The complete answer to the contention of plaintiff in error is furnished by the very decision which is cited in support of the contention. In the case at bar discrimination was practiced against plaintiff's assignors and such discrimination resulted in the imposition of excessive charges.

Plaintiff in error also cites *Penn. R. R. Co.* v. *International Coal Co.*, 230 U. S. 184, in support of this contention and the statement of Mr. Justice Lamar that "before any party can recover under the act

he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury" is quoted.

In *Pennsylvania R. R. Co.* v. *International Coal Co.,* 230 U. S. 184, which was an action to recover damages for rebating, the Supreme Court held that the plaintiff was entitled to damages, but that the measure of the damages was not necessarily the difference between the rate paid by plaintiff and the lower rate obtained by other shippers through a rebate. Plaitiff obtained judgment in the trial court and the railroad company brought the case to the Supreme Court by writ of error. The plaintiff contended that as a matter of law it was entitled to recover as damages the difference between the rates which it paid and the lower rate accorded to other shippers by reason of rebates. *The plaintiff was in effect suing to obtain similar rebates.*

It appears that in the original Bill to Regulate Commerce, which passed the Senate May 12th, 1886, it was provided that the carrier "should be liable to all persons who have been charged a higher rate than was charged any other person or persons, for the difference between such higher rate and the lowest rate charged upon like shipments during the same period. This provision was omitted from the Act as finally passed, and the Supreme Court held that the fact of this omission was conclusive against the plaintiff's claim.

In its opinion, the Court said:

> "Having paid only the lawful rate, the plaintiff was not overcharged, though the favored shipper was illegally undercharged."

The Court further stated:

> "Making an illegal undercharge to one shipper did not license the carrier to make a similar undercharge to other shippers, and if having paid a rebate of 25 cents per ton to one customer, the carrier, in order to escape the suit, had made a similar undercharge or rebate to the plaintiff, it would have been criminally liable, even though it may have done so in order to equalize the two companies."

The Supreme Court further said:

> "To adopt such a rule and arbitrarily measure damages by rebates would create a legalized but endless chain of departures from the tariff; would extend the effect of the original crime, would destroy the equality and certainty of rates, and, contrary to statute, would make the carrier liable for damages beyond those inflicted and to persons not injured."

Let us contrast the section of the Interstate Commerce Act under consideration in the case of *Penn. R. R. Co.* v. *International Coal Co., supra,* with the prohibition of Section 21 of the Constitution of California. Section 21 of the Constitution provided that persons and property transported over any railroad should be delivered at charges not exceeding the charges for the transportation of persons and property of the same class, in the same direction, to any more distant station, port or landing. Section 2 of the Interstate Commerce Act reads as follows:

> "Section 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback or other device, charge, demand, collect or receive from any person or persons, a greater

> or less compensation for any service rendered, or to be rendered in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

*The provision of the Constitution is for the benefit of the shipper, and in express terms confers upon him the right to have his property transported at charges not exceeding those made by the carrier to the more distant point.* The provisions of Section 2 of the Interstate Commerce Act merely declares unlawful the charging of one shipper a lower rate than is charged another. *It does not provide that every shipper shall be entitled to the same rate that is accorded the favored shipper, nor that property transported shall be delivered at charges not exceeding the charges made to any other person for the same service. Clearly, Section* 21 *of the Constitution was intended to fix as the legal rate to the intermediate point the rate charged to the more distant point; but Section* 2 *of the Interstate Commerce Act does not purport to fix the legal rate for a particular service at the rate charged a favored shipper for the same service.*

Nevertheless the Supreme Court would undoubtedly have held the plaintiff in the case of *Penn. R. R. Co.* v. *International Coal Co., supra,* entitled

to recover the difference between the charges paid by it and that paid by the favored shippers, if it had not been for certain considerations which the majority of the Court held to be controlling.

One of these considerations, already adverted to, was the fact that Section 2 of the Bill as it originally passed the Senate, contained a provision that the carrier shall be liable to all persons who have been charged a higher rate than was charged any other person or persons, for the difference between such higher rate and the lowest rate charged upon like shipments during the same period; but that such provision was omitted from the act as finally passed by Congress.

The violation of the act complained of in *Penn. R. R. Co.* v. *International Coal Co., supra*, was of the same character as the violation complained of in *Great Western Ry. Co.* v. *Sutton,* L. R. 4, H. L. 226 (1869), *supra,* where the English courts held that the plaintiff was entitled to recover the difference betwen what he paid and the lesser amount charged to the favored shipper. *But the English Act contained no provision similar to Section* 8 *of the Interstate Commerce Act.*

*Furthermore, the decision in Penn. R. R. Co.* v. *International Coal Co., supra, was based upon the law that the carrier was not lawfully entitled to charge a lower rate than the rate published in its tariff.* By the Interstate Commerce Act the carrier is forbidden to charge more or less than the rate specified in its tariffs, whereas the Act of Parliament contained no such provision. Therefore the English courts in *Great Western Ry. Co.* v. *Sutton, supra,* held, in effect, that the lower rate accorded to the

favored shipper was the lawful rate. Having held that such lower rate was the lawful rate, it followed that any charge in excess of such rate was extortionate and recoverable in an action for money had and received. This is clearly pointed out by the Supreme Court in *Penn. R. R. Company* v. *International Coal Co., supra,* where the Court, at page 202, said:

> *"The Act of Parliament did not require the carrier to maintain its published tariff but made the lowest rate the lawful rate.* Anything in excess of such lowest rate was extortion, and might be recovered in an action at law as for an overcharge. *Denaby v. Manchester Ry.,* L. R. 11 App. Cases 97, 116. *But the English courts make a clear distinction between overcharge and damages, and the same is true under the Commerce Act. For if the plaintiff here had been required to pay more than the tariff rate it could have recovered the excess, not as damages but as overcharge,* and while one count of the complaint asserted a claim of this nature, the proof did not justify a verdict thereon, for the plaintiff admitted that it had only paid the lawful rates named in the tariff. *Of course, no part of such payment of lawful rates can be treated as an overcharge or as an extortion."*

And herein lies the chief distinction between the right of the plaintiff here and the right of the plaintiff in the *International Coal Company* case, *supra. The tariff rate paid by the plaintiff in the International Coal Company case was the lawful rate; but the rate charged the plaintiff in this case was not the lawful rate, because expressly made unlawful by the Constitution.* In the *International Coal Co. case, supra,* the plaintiff sought to recover the difference between the lawful rate which it

paid and the unlawful rate charged another shipper. *The plaintiff here was not seeking to recover the difference between a lawful rate which he paid and an unlawful rate paid by another person, but was seeking to recover the difference between the unlawful rate which he paid and the lawful rate which should have been charged.*

*In the case of the Pennsylvania R. R. Co.* v. *International Coal Co.,* 230 *U. S.* 184, *supra, the Supreme Court held that the giving of an unlawful rebate to one shipper did not fix the measure of the plaintiff's damage at the difference between the unlawfully low rate accorded the favored shipper and the lawful rate paid by plaintiff.*

But in the case at bar, the assignors of defendant in error were charged an unlawful rate. The complaint alleges the facts showing the difference between the unlawful rate which was charged and the lawful rate which should have been charged. The damage to the assignors of defendant in error resulted as a matter of law. Both the fact and measure of damage conclusively resulted from the facts pleaded in the complaint and admitted by the answer.

We have shown *ante* that the statutes of 1909 and 1911 made discrimination unlawful and conferred a right of action upon any person damaged by discrimination. We have also shown that the charging of more for the shorter than for the longer distance was discrimination.

But the statutory right of action exists here wholly independent of the provisions of the statutes of 1909 and 1911 prohibiting discrimination. *Both statutes*

*forbid a carrier to charge more than the lawful tariff rate. When the plaintiff published in its tariff the lower rate for the longer distance that lower rate became the maximum rate which it could lawfully charge to intermediate points. The lower published rate to the more distant point was the tariff rate for all intermediate points, and when the plaintiff in error charged a greater sum than the published rate for the longer distance it charged in excess of the tariff rate for the shorter distance, thereby violating the express prohibitions of the Acts of* 1909 *and* 1911 *against charging more than the published rate.*

The Constitution as it now exists provides that no carrier shall charge more for a long haul than it charges for the sum of the intermediate hauls. If, for example, the published tariff rate from San Francisco to Bakersfield on a given commodity was 40 cents per hundred pounds, and the rate from San Francisco to Fresno was 20 cents, and the rate from Fresno to Bakersfield 10 cents, the lawful tariff rate to Bakersfield would be 30 cents and not 40 cents. The courts and the railroad commissions have uniformly so construed tariffs where such a statute existed. The situation is precisely analogous to that arising under the provisions of the Constitution prescribing that property shall be transported for the shorter distance at charges not exceeding those made for the longer distance.

Under the fifth head of this brief, where the contention of plaintiff in error that, as to the causes of action which accrued after October 10, 1911, the Commission granted permission to charge more for the shorter distance is replied to, we shall refer to the various orders of the Commission made after

the amendment to the Constitution. Although the Commission unquestionably entertained an erroneous view of its powers under this amendment, its views in relation to the effect of the published rate to the long haul point are unquestionably correct. By its order of January 16, 1912, appearing at pages 425 and 426 of the Record, it is provided:

> "*As to any rate or fare as to which neither such schedule nor such application has been filed with this Commission by said date, the provisions of said Section* 21, *Article XII, of the Constitution will at once become operative, and the lower rate or fare for a longer distance will become the maximum rate or fare for all intermediate points on the same line or route for movements in the same direction, the shorter haul being included within the longer distance,* and the aggregate of the intermediate rates or fares will become the through rate or fare in cases in which the through rate or fare is now in excess of the aggregate of the intermediate rates or fares."

Plaintiff in error seems to have some not well defined idea that the complaint does not state facts from which damage will be inferred as a matter of law because "most of the assignors of the defendant in error seem to be mercantile firms which have probably passed on the so-called excessive charge to their customers. It is also said that the Interstate Commerce Commission has held "that the doctrine of reparation does not obtain in such a case where the charge has been passed on to others by the person paying it, and where such person has not shown any damage to himself."

If plaintiff in error means to contend that the

owner of property who pays an unlawful charge for its transportation is not entitled to recover damages for the exaction of such charges unless he can show that he did not "pass on" the charge to his customers then the plaintiff in error has been laboring under a very serious misapprehension of the law. The Interstate Commerce Commission in numerous cases has held directly to the contrary. In *Burgess* v. *Transcontinental Freight Bureau,* 13 I. C. C. 688, 679, the Commission in replying to the contention of the carrier that the complainant was not damaged "because the advance in the freight rate had been added to the price paid by the customer," said:

> *"It is impossible to say, therefore, to what extent these complainants may have been actually damaged by the advance in this rate, if the word 'damage' is to be interpreted and applied as claimed by the defendants.*
>
> *"Such is not, in our opinion, the proper meaning of this term. These complainants were shippers of hardwood lumber to this destination and they were entitled to a reasonable rate from the defendants for the service of transportation. An unreasonable rate was, in fact, exacted. They were thereby deprived of a legal right and the measure of their damage is the difference between the rate to which they were entitled and the rate which they were compelled to pay.* If complainants were obliged to follow every transaction to its ultimate result and to trace out the exact commercial effect of the freight rate paid, it would never be possible to show damages with sufficient accuracy to justify giving them. *Certainly these defendants are not entitled to this money which they have taken from the complainants, and they ought not to be heard to say that they should not be required to refund this amount*

*because the complainants themselves may have obtained some portion of this sum from the consumer of the commodity."*

In *Kindelon* v. *S. P. Co.*, 17 I. C. C. 251, 255, the Commission said:

"The defendants further contend that the complainants herein have not shown that they were damaged. *It is well settled that reparation in any given case is due the person who has been required to pay an unlawful charge as the price of transportation. The shipper who has been charged an unlawful rate and who is the owner of goods transported is entitled to repayment without the imposition of the impossible task upon the Commission of ascertaining the ultimate profits accruing from the business of the shipper. Moreover, the owner of the freight who has been required to pay an unreasonable rate is entitled, upon proper complaint and showing, to reparation irrespective of the profits accruing from his business."*

In *Michigan Hardwood Mfrs. Assn.* v. *Freight Bureau*, 27 I. C. C. 32, 39 (decided May 6, 1913), the Interstate Commerce Commission said:

*"The defendants urge that, inasmuch as the complainants increased the price of their lumber by the amount of the increase in the transportation charge, they have suffered no damage.*

"With respect to the practical aspect of this claim it may be said:

*"There is no fixed mill price for this lumber, nor does the manufacturer always obtain the price which he quotes. While, therefore, these complainants may have attempted to increase their price upon the Pacific Coast by the amount of the advance in the freight rate, it is by no means certain that they obtained in all cases, nor*

*in any case, the full price at the mill which they otherwise would. While it may be that some portion of this advance was in most instances added to the price obtained for the lumber, it is probable that the full amount of the advance was seldom recouped. It must be evident that where there is no established price at the mill it would be impossible to determine the amount of damage to which the complainants would be entitled upon this basis.*

"The profit which a lumber manufacturer makes depends not only upon his profit per 1,000 feet, but also upon the number of thousand feet which he sells. The hardwood lumber which is consumed upon the Pacific Coast is brought in from foreign countries as well as from the east. An advance of $4 per 1,000 feet would certainly tend to limit the sales of the eastern producer as compared with his foreign competitor. Assuming, therefore, that an advance equal to the increase in the freight rate was charged, the number of sales might have declined so that the total profit to the shipper was very much less than it otherwise would have been. *Evidently the complainants' damages could not be assessed upon any such speculative basis.* * * * We find that these complainants have been compelled to pay a rate of 85 cents, that this rate ought not to have exceeded 80 cents *and that the complainants have been damaged by that amount which the defendants have unlawfully exacted from them.*"

There are 120 causes of action stated in the complaint. One hundred and two of these are on behalf of the owners of the goods transported. The other eighteen (viz. Nos. 58 to 65, inclusive, 68 to 74, inclusive, and 86, 87 and 88) are on behalf on shippers who paid the unlawful charges. In these eighteen causes of action it is not alleged that the assignors of

plaintiff were the owners of the goods transported. As to these eighteen causes of action, therefore, the complaint may not allege facts sufficient to state a cause of action under the statute. As to the other 102 causes of action, however, facts are alleged which show that plaintiff's assignors were the owners of the property transported. In these causes of action it is alleged that plaintiff's assignors were the consignors of the property, which is equivalent to an allegation of ownership, as *the consignee is presumed to be the owner of the property transported.*

*Fitzhugh* v. *Wiman,* 9 N. Y. 559.

*Hardy* v. *Monroe,* 127 Mass. 64.

*Cleveland, etc., Ry. Co.* v. *Moline Plow Co.,* 41 N. E. 480 (Ind.).

*Pennsylvania, etc., Co.* v. *Poor,* 3 N. E. 253 (Ind.).

*Hutchinson on Carriers* (3rd ed.), Secs. 1320, 1315, 735, 1304, 1317.

Plaintiff in error contends (page 92) that not only is there an "absence of any statutory theory" for the recovery of the damages resulting from the overcharge, but that the railroad statutes "have effectively foreclosed any claim that may be made by the defendant in error that it is relying upon the common law liability or a common law right of action."

It is very clear that the statutory provisions quoted above conferring a right of action upon the person damaged by a violation of the provisions of the act did not abrogate any common law right of action which existed independent of the statutes. As pointed out in *Texas & Pacific* v. *Abilene Oil Co.,*

204 U. S. 526, and *Robinson* v. *B. & O. R. R. Co.*, 222 U. S. 506, the only common law rights which were abrogated by the Interstate Commerce Act were such rights whose continued existence was inconsistent with the provisions of the Statute. At common law a shipper who paid an unreasonably high charge was entitled to maintain an action at law to recover the excess over a reasonable charge. In the above mentioned cases it was contended that such common law right still existed notwithstanding Congress had created a tribunal for the very purpose of determining whether a given rate was reasonable or not. The Supreme Court held that this common law right was abrogated by the provisions of the statute, but expressly recognized the existence of all prior common law rights not necessarily inconsistent with the statute.

At common law, a person who paid an unlawful charge to secure the transportation of property was entitled to recover the excess over a ~~reasonable~~ lawful charge. It was immaterial whether or not he was the owner of the property transported. This common law right is entirely consistent with our railroad statutes. In the case of *Penn. R. R. Co.* v. *International Coal Co.*, 230 U. S. 184, *supra, the Supreme Court said*:

> "The English courts make a clear distinction between overcharges and damages, *and the same is true under the Commerce Act.* For if the plaintiff here had been required to pay more than the tariff rate it could have recovered the excess, not as damages but as an overcharge, and while one count of the complaint asserted a claim of this nature, the proof did not justify a verdict thereon, for the plaintiff admitted it had only paid the lawful rates named in the tariff."

Of course it is clear that the charging of more than the lawful rate entitles the owner of property who pays the same to damages under Section 8 of the Interstate Commerce Act and the corresponding sections of our statutes. Such person has a common law right and (if he is the owner of the property transported) also a right of action for damages under the statute.

Like the Interstate Commerce Act, neither the Statutes of 1909, 1911, nor the Public Utilities Act abrogate any common law right whose continued existence is not repugnant to the provisions of the statutes.

Moreover, as the Constitution fixed as the charge for the shorter haul the lesser charge made for the longer haul, and as it results from such provision of the Constitution that a shipper who was required to pay more has the right to recover the excess over the lawful charge, it would have been beyond the power of the Legislature to abrogate such right. It is clear that the Legislature has no power to take away or impair a right expressly or impliedly given by the Constitution.

As such right necessarily resulted from the Constitutional provision, the Legislature would not have had the power to impair it or to change the construction of the Constitution. It undoubtedly had the power to add other rights, but not to impair those resulting from the construction of the organic law.

**4. THAT IT IS WHOLLY IMMATERIAL WHETHER FORMAL PROTEST WAS MADE AT THE TIME OF THE PAYMENT OF THE ILLEGAL CHARGES.**

Plaintiff in error contends that the Court erred in over-ruling the demurrer to the tenth separate defense, which alleged that the assignors of defendant in error paid the charges complained of without protest.

There are three answers to this contention. These are:

(a) *That a formal protest was wholly unnecessary as at common law charges paid by the consignor in order to secure the transportation of property or by the consignee in order to obtain possession of property transported are not voluntarily paid.*

(b) *The common law rule that payments made to a common carrier should be involuntary in order to entitle the person paying the same to recover is wholly inconsistent with the provisions of the Statute of* 1909, *the Statute of* 1911, *and the Public Utilities Act prohibiting discrimination and preferences of all kinds.*

(c) *That this is a statutory action brought in pursuance of the provisions of the Statute of* 1909, *the Statute of* 1911, *and the Public Utilities Act, and it is wholly immaterial, therefore, whether the payments were voluntarily made or not.*

**(a) That a formal protest was wholly unnecessary as at common law charges paid by the consignor in order to secure the transportation of property or by the consignee in order**

**to obtain the possession of property transported are not voluntarily paid.**

In support of the contention that a formal protest was necessary, plaintiff in error cites *Brumagin* v. *Tillinghast,* 18 Cal. 269, and *Killmer* v. *N. Y. C. R. R. Co.,* 100 N. Y. 395.

In 102 of the causes of action stated in the complaint, it is alleged (Paragraph IV), "that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor said plaintiff's assignor was compelled to pay the said charges demanded by defendant." By Paragraph II of the Answer (Record p. 334) it is admitted that defendant "*would not have delivered said property to plaintiff's assignors if said charges demanded by defendant had not been paid.*" In these 102 causes of action the assignors of defendant in error were consignees of the property transported. In eighteen of the 120 causes of action it is stated in the complaint and admitted by the answer that defendant would not have transported the property if the charges demanded had not been paid (Answer Paragraph IV, Record p. 335). In these eighteen causes of action plaintiff's assignors were consignors.

In *Heiserman* v. *Burlington, etc., Ry. Co.,* 18 N. W. 903 (Iowa), which was an action against a railroad company to recover excessive charges, the Supreme Court of Iowa said:

> "*Nor need the plaintiff, in a case brought to enforce such an obligation show objection or protest prior to the payment in excess of reasonable compensation. These rules are founded upon the consideration that railroad companies are public*

*carriers, and those who employ them are in their power, and must bow to the rod of authority which they hold over consignors and consignees of property transported by them. If the consignor refuses to pay or contract to pay the charges fixed by the railroad company, his goods will not be carried; or, if the consignee refuses to make the payment demanded, the goods will not be delivered. In both cases great loss and even destruction of profitable business will result. If railroad companies should be held free from liability for excessive charges the whole business of the country would be subject to unjust exactions resulting in oppression to citizens and destructive to useful and profitable business. The law does not require objection or protest to the payment of unjust charges, for the reasons they would be vain, being addressed to those who occupy the commanding position of power to endorse obedience to their requirements.* For another reason they are not required. Those who do business with railroads never come in contact with the officers who possess authority to fix or abate rates of charges; indeed, they usually hardly know their names or where to find them. Their places of business are usually in cities distant from points where much of the property is received for transportation. If the consignee should be required to make objection or protest to these officials, delays would follow, resulting in loss, and, in case of the shipment of some kinds of perishable property, in its decay. *These considerations take the case from the operation of the familiar rule which forbids recovery on account of payments voluntarily made without objection or protest.* This rule does not apply to cases of compulsory payments, *and does not require objection and protest where they would be unavailing and vain.* The doctrines we have expressed are supported by the following authorities: *Chicago and A. Ry. Co.* v. *Coal Co.,* 79 Ill. 121; *Mobile & M. Ry.*

*Co.* v. *Steiner,* 61 Ala. 559; *Parker* v. *G. W. Ry. Co.,* 7 Man. & G. 253; *Harmony* v. *Bingham,* 12 N. Y. 99; *Chandler* v. *Sanger,* 114 Mass. 364; *Stephan* v. *Daniels,* 27 Ohio 527; *Robinson* v. *Ezzell,* 72 N. C. 231; *Carew* v. *Rutherford,* 106 Mass. 1; *Lafayette & I. Ry. Co.* v. *Pattison,* 41 Ind. 312; *Philanthropic Building Ass'n* v. *McKnight,* 35 P. St. 470; *Wood* v. *Lake,* 13 Wis. 84; *Wheaton* v. *Hibbard,* 20 Johns 290; *Thomas* v. *Shoemaker,* 6 Watts & S. 179; *Palmer* v. *Lord,* 6 Johns Ch. 95; *State Bank* v. *Ensminger,* 7 Blackf. 105."

In the above case no protest was made and the carrier averred that plaintiff "knowingly, voluntarily and willingly" paid the charges.

*Mobile* v. *Steiner,* 61 Ala. 571, was an action in principle identical with the case at bar. The Statute of Alabama provided that a railroad should not charge for an intermediate haul charges exceeding by more than 50 per cent the charge for the long haul. In holding that a person who made payments exceeding by more than 50 per cent the charge for the long haul was entitled to recover the excess, the Supreme Court of Alabama said:

> "*We have shown above that any demand and payment of charges for transportation of local freight, above fifty per cent increase on the rate of the same description of freight over the whole line of the railroad, is excessive and illegal. It is in positive disregard and violation of the mandate of the law.* It is contended for appellant, first, that inasmuch as the statute has declared the rate of tolls, and has given a penalty for its violation, this remedy is exclusive, and none other can be resorted to. *Second, that the payments were voluntarily made, and therefore can not be recovered back. We do not think there is*

*anything in either of these objections.* In regard to the first, any violation of a statute or disregard of a statutory duty by which another suffers a pecuniary loss, gives to the injured party a right of action for damages sustained. *Satterfield, Ex'r of Grey* v. *Mobile Trade Co.,* 55 Ala. 387 (28 Am. Rep. 729). And where the wrong consists in the unauthorized demand of money and its payment under such unauthorized demand, this is money had and received by the demandant for the use and benefit of the payer, unless the case falls within the principle of money voluntarily paid; and a count for money had and received is sufficient for its recovery. The second objection. Railroads have so expedited and cheapened travel and transportation; have so driven from their domain all competing modes of transportation, that the public is left no discretion but to employ them, or suffer irreparable injury in this age of steam and electricity. They have established rates of charges, and these the shipper must pay, or forego their facilities and benefits. *To object or protest would be an idle waste of words. The law looks to the substance of things and does not require useless forms or ceremonies. The corporation and the shipper are in no sense on equal terms, and money thus paid to obtain a necessary service, is not voluntarily paid, as the law interprets that phrase.* In the case of the Chicago and Alton Railroad Co. v. the C. V. & W. Coal Co., 79 Ill. 121, the Court in reply to the objections that the money was voluntarily paid, said: 'It can hardly be said these enhanced charges were voluntarily paid by the appellees. It was a case of life or death with them, as they had no other means of conveying their coals to the markets offered by the Illinois Central, and were bound to accede to any terms appellants might impose. They were under a sort of moral duress, by submitting to which appellants have received money from them which in equity and

good conscience they ought not to retain.' The case of *Parker* v. *G. Wes. R. R. Co.,* 7 Man. & Gr. 253, as a suit by a shipper to recover back excessive charges paid the railroad. It was objected that the payment was voluntary. The Court, C. J. Tindall, said: 'We are of opinion that the payments were not voluntary. They were made in order to induce the company to do that which they were bound to do without them; and for the refusal to do which an action on the case might have been maintained.' The case was assumpsit for money had and received, and the Court ruled that the action was well brought. To the same effect are the following authorities: 2 *Greenl. Ev.* Sec. 121; *Colwell* v. *Peden,* 3 Watts 327; *Harmony* v. *Bingham,* 12 N. Y. 99 (62 Am. Rep. 142); *Bos. & S. Glass Co.* v. *City of Boston,* 4 Metc. 181; *Chandler* v. *Sanger,* 114 Mass. 364 (19 Am. Rep. 367); *Stephan* v. *Daniels,* 27 Ohio St. 527; *Tuttle* v. *Everett,* 51 Miss 27 (Am. Rep. 622); *Howe* v. *State,* 53 Miss. 57; *Robinson* v. *Ezzell,* 72 N. C. 231; *First National Bank* v. *Watkins,* 21 Mich. 483; *Atwell* v. *Zeluff,* 26 Mich. 188; *McKee* v. *Campbell,* 27 Mich. 497; *Carew* v. *Rutherford,* 106 Mass. 1 (18 Am. Rep. 287); *L. & I. Railroad Co.* v. *Pattison,* 41 Ind. 312."

Quotations from other decisions to the same general effect as the above could be multiplied, but that is unnecessary.

The case of *Killmer* v. *R. R.,* 100 N. Y. 395, cited by plaintiff in error stands practically alone and is contrary to the great weight of authority.

Moreover, the *Killmer* case involved the payment of tariff charges which the plaintiff claimed were unlawful because unreasonably high. Prima facie at least they were lawful. Here, however, the charges paid were in violation of a plain constitutional provision.

In *Hardaway* v. *So. Ry.*, 73 S. E. 1020 (S. C.), cited by defendant, the payments were not made before the goods were delivered.

The case of *Hanford Gas & Power Co.* v. *Hanford,* 163 Cal. 108, did not involve the payment of freight charges to a common carrier and can have no application to the case at bar.

Plaintiff in error states that "it does not appear that the assignors of defendant in error had any interest whatever in the goods on which the freightage was demanded."

In 102 out of the 120 causes of action the assignors of defendant in error were the consignees of the property transported and are *presumed to be the owners thereof.* The authorities to this effect are cited under the preceding head of this brief at page 81. As to such of the assignors of defendant in error who were consignors, the allegations of the complaint show that they were in possession of the property and that they delivered it to plaintiff in error for transportation. Plaintiff in error was under the legal obligation to transport such property at the lawful rate and if plaintiff's assignors were required to have any "interest" in the property in order to recover the excessive charge it may be said that their possession constituted a sufficient interest. It has never been held by any court, however, that it was incumbent upon such person to allege or prove that he had an interest in the property transported.

**(b) The common law rule that payments made to a common carrier should be involuntary in order to entitle the person paying the same to recover is wholly inconsistent with the**

**provisions of the Statute of 1909, the Statute of 1911 and the Public Utilities Act prohibiting discrimination and preferences of all kinds.**

*The Interstate Commerce Commission has held that the Interstate Commerce Act (which for all practical purposes is identical with our statutes) abrogated the common law requirement that a payment of unlawful freight to a carrier should be compulsory in order to entitle the person making the payment to recover.*

The Supreme Court of the United States in many cases, and particularly in the case of *A. J. Phillips Co.* v. *G. T. W. Co.,* 35 U. S. Sup. Ct. Rep. 444 (advance sheets), has so construed the Interstate Commerce Act as to leave no doubt that when and if the question comes before that court for decision it will hold that unlawful payments, whether voluntary or involuntary, may be recovered.

Before quoting from these decisions, we shall quote the sections of the Interstate Commerce Act bearing upon this matter. Section 2 of the act is as follows:

> "Sec. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and

conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

Section 3 (in part) is as follows:

"Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The foregoing are the provisions of the Interstate Commerce Act prohibiting discrimination or favoritism by any device whatsoever. As we shall hereafter see our statutes contain almost identical provisions.

In *Baer Bros.* v. *M. P. Ry. Co.,* 13 I. C. C. Rep. 339, which was an application to the Interstate Commerce Commission to recover damages for the exaction of an unreasonably high rate, the Commission, with reference to the claim that the payments were made without protest, said:

"The Supreme Court of the United States has held that the reasonableness of railway charges where the question of reparation is involved must be first passed upon by this Commission, and this decision rests largely upon the ground that in no other way can the Act to regulate commerce be applied as to prevent confusion and

gross discrimination between shippers. *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426. *If it should be finally determined that a protest must be made at the time of payment of the freight money in each case, the result would be the grossest discrimination. A shipper paying under protest without the knowledge of other shippers might thus obtain the right to recover these charges while all other persons were debarred from that privilege during the period covered by the protest.*"

In *So. Pine Lbr. Co.* v. *So. Ry. Co.,* 14 I. C. C. Rep. 197, the Commission in overruling the contention that the claimant was not entitled to recover for the reason that no protest was made said:

> "It is also manifest that to sustain this contention would be to open the way to the grossest discriminations, to prevent which is one of the leading purposes of the Act to Regulate Commerce."

Both of these cases were proceedings before the Commission to recover excessive charges, the complaints maintaining that the charges were unlawful because unreasonably high.

Under Section 9 of the Act, a person who is required to pay unlawful rates must elect whether he will proceed before the Commission or in the courts.

*But it is most apparent that the reasoning of the Commission applies equally to all unlawful charges exacted by a carrier and that the same discrimination would result whether the charges sought to be recovered were contrary to the provision of the Act requir-*

*ing all charges to be reasonable or contrary to the long and short haul clause contained in Section 4 of the Act, or contrary to the prohibition against charging more than the tariff rate.*

The Act could not possibly be construed to mean that a shipper who voluntarily paid an unreasonable charge had the same right of recovery as one who paid it under compulsion, but that a shipper who voluntarily paid charges in excess of the tariff rate could not recover while his neighbor who paid under protest (or as a condition to receiving his goods) could recover. The gross discrimination referred to by the Interstate Commerce Commission would exist equally in both cases.

Although the Commission did not expressly hold that it was immaterial whether the payment was voluntary or not such must be the effect of its decisions. The only purpose of a protest (in cases where it is required) is to rebut the presumption that the payment was voluntary. In effect, therefore, the Commission held that it was immaterial whether the payment was voluntary or involuntary as to deny a recovery in the one case and to permit it in the other would result in gross discrimination.

The Interstate Commerce Commission did not in replying to the contention of the carrier that the payments were made without protest make the same answer that the courts have made in similar cases, viz.: "A protest is unnecessary as it would have been idle and the payment was involuntary nevertheless" but they replied (having in view the provisions of the Act prohibiting discrimination and preferences of all kinds) in effect as follows: "To hold a payment of unlawful charges not recoverable

because voluntarily made and one recoverable because involuntary would result in gross discrimination, hence all payments made contrary to provisions of the Act are recoverable whether voluntary or involuntary."

In the very late case of *A. J. Phillips Co.* v. *G. T. W. Co.,* 35 U. S. Sup. Ct. Rep. 444 (advance sheets) *supra,* the Supreme Court held that a carrier could not waive the statute of limitations in favor of one shipper and plead it against another. In so holding, the Supreme Court said:

> "Under such a statute (the court refers to the statute of limitations contained in Sec. 16 of the Interstate Commerce Act) the lapse of time not only bars the remedy, but destroys the liability (*Finn* v. *United States,* 123 U. S. 227, 232, 31 L. ed. 128, 130, 8 Sup. Ct. Rep. 82), whether complaint is filed with the Commission or suit is brought in a court of competent jurisdiction. *This will more distinctly appear by considering the requirements of uniformity which, in this, as in so many other instances, must be borne in mind in construing the commerce act.* The obligation of the carrier to adhere to the legal rate, to refund only what is permitted by law, *and to treat all shippers alike, would have made it illegal for the carriers, either by silence or by express waiver, to preserve to the Phillips Company a rate of action which the statute required should be asserted within a fixed period.* To have one period of limitation where the complaint is filed before the Commission, and the varying periods of limitation of the different states, where a suit was brought in a court of competent jurisdiction; *or to permit a railroad company to plead the statute of limitations as against some, and to waive it as against others, would be to prefer some and discriminate against others, in violation of*

> *the terms of the commerce act, which forbids all devices by which such results may be accomplished.* The prohibitions of the statute against unjust discrimination relate not only to inequality of charges and inequality of facilities, *but also to the giving of preferences by means of consent judgments, or the waiver of defenses open to the carrier.* The railroad company therefore was bound to claim the benefit of the statute here, and could do so here by general demurrer."

If our statutes permitted a carrier to plead that a payment of unlawful freight charges was made after the goods were delivered and was therefore voluntary a carrier would be in a position to plead such defense as against one shipper who paid an unlawful charge and to fail to plead it as against another who paid such a charge thereby destroying the equality of treatment which the statutes require in precisely the manner described by the United States Supreme Court in the *Phillips* Case. *This decision holds that the obligation to charge and receive the lawful rate is a mutual one which neither the carrier nor the shipper can avoid and that the carrier will not be permitted to refund to one shipper and refuse to refund to another.* It is wholly immaterial by what device the discrimination is practiced. If one shipper through alertness saw to it that his payments were "involuntary" and was permitted to recover, while another who was negligent and made the payment "voluntarily" (as for example by taking delivery the day before the payment was made) was denied the right to recover it is clear that one of the cardinal purposes of the Act would be subverted.

That common law rules and rights which are inconsistent with the Interstate Commerce Act are im-

pliedly abrogated thereby was held by the United States Supreme Court in the case of *Texas & P. Ry. Co.* v. *Abilene Oil Co.,* 204 U. S. 426, 436. In that case the plaintiff insisted that the common law right to recover by action at law the excess over a reasonable charge was not abrogated by the Interstate Commerce Act. In holding to the contrary the Supreme Court, after referring to the principle that at common law such right existed, said (pg. 436):

> "As the right to recover, which the court below sustained, was clearly within the principles just stated, and as it is conceded that the act to regulate commerce did not in so many words abrogate such right, it follows that the contention that the right was taken away by the act to regulate commerce rests upon the proposition that such result was accomplished by implication. In testing the correctness of this proposition we concede that we must be guided by the principle that repeals by implication are not favored, and indeed that a statute will not be construed as taking away a common law right existing at the date of its enactment, unless that result is imperatively required; that is to say, *unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory.*"

Further the Supreme Court said (pg. 441):

> "Equally obvious is it that the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, *would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready*

> *means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted."*

So in the case of *Robinson* v. *B. & O. R. R. Co.,* 222 U. S. 506, 510, the Supreme Court in deciding a case involving the same question decided in *Texas & Pacific Ry. Co.* v. *Abilene Oil Co., supra,* said:

> "And this is so, because the existence and exercise of a right to maintain an action of that character (the common law action to recover the excess over a reasonable charge, in the absence of such an investigation and order, would be repugnant to the declared rule that a rate established in the mode prescribed should be deemed the legal rate and obligatory alike upon carrier and shipper until changed in the manner provided, would be in derogation of the power expressly delegated to the Commission, *and would be destructive of the uniformity and equality which the Act was designed to secure."*

As we have already seen the causes of action in the complaint herein accrued under three different acts of the legislature. The earliest ones accrued under the Act of 1909 (Stats. 1909:499), the later ones under the Act of 1911 (Stats. 1911:13) and the latest under the Public Utilities Act (Extra Session 1911: 18). *All of these acts insofar as they relate to the prohibition of discrimination and preferences contain provisions practically identical with the Interstate Commerce Act.*

These provisions of the statutes of 1909 and 1911 are quoted at pages 59 et seq. of this brief. The provisions of the Public Utilities Act corresponding to the provisions of the Interstate Commerce Act are contained in Sections 19 and 32.

Discrimination is also forbidden by Section 21 of Article XII of the Constitution. The general prohibition against discrimination is the same in the Section as amended October 10, 1911, as it was before such amendment.

It is very apparent that the common law rule that a payment voluntarily made could not be recovered can have no application to the payment of unlawful freight charges, as the continued existence of such rule is wholly inconsistent with the provisions of our railroad statutes enacted to prevent discrimination and preferences and to secure equality of treatment to all persons transporting property.

**(c) That this is a statutory action brought in pursuance of the provisions of the Statute of 1909, the Statute of 1911 and the Public Utilities Act, and it is wholly immaterial, therefore, whether the payments were voluntarily made or not.**

The statutory provisions authorizing the prosecution of this action are referred to and quoted under the preceding head of this brief at pages 62 et seq. The entire argument appearing at pages 57 to 83, *supra,* is applicable to the matter discussed under this subdivision. Unquestionably as far as 102 of the causes of action are concerned this is an action for damages under the statutes. In 102 of the causes of action facts are alleged which show that plaintiff's assignors were the owners of the property transported.

This action is authorized by Section 38 of the Act of 1909 (Stats. 1909:499) by Section 43 of the Act of 1911 (Stats. 1911:13) and by Section 73 (a) of the Public Utilities Act (Extra Session 1911:18).

As shown under the preceding head of this brief the Acts of 1909 and 1911 prohibit discrimination and confer a right of action upon any person damaged by discrimination. We have also seen that the charging of more for the shorter than for the longer distance is a species of discrimination expressly forbidden by the Constitution, and that the provisions of these Acts prohibiting discrimination or preferences, as between persons and places, must be construed to prohibit what the Constitution forbids. We have also seen that the Public Utilities Act (Sec. 73 (a)) expressly confers a right of action for the violation of the Constitution. It also appears that the plaintiff in error has violated the provisions of the Acts of 1909 and 1911 prohibiting the charging of more than the tariff rate. This because the lower rate to the more distant point published in the tariffs of plaintiff in error became the maximum legal tariff rate to the intermediate points. The conclusion is irresistible that the complaint states a cause of action for damages under the statutes and that the measure of the damages in conclusively fixed.

*The remedy given by the statutes being a special statutory one, it is wholly immaterial whether the payments were voluntarily made or not, as the statutory liability exists in every case where excessive or discriminatory charges are collected.*

In *Penn. R. R. Co.* v. *International Coal Mining Co.,* 173 Fed. 1, 7, the railroad contended that with the knowledge that other shippers were obtaining a lower rate for the same service, plaintiff nevertheless paid the freight without protest. In holding that it was immaterial whether the payment was voluntary or involuntary, the Circuit Court of Appeals said:

"It is now claimed that the absence of protest accompanying payment of freight is fatal to the right of action. We are of opinion such is not the case. *This is not the ordinary case of a suit to recover back a sum of money which has been mistakenly paid and received, but is one where a statute has stamped the receipt of the money as unlawful.* Thus Section 2 provides:

> 'Such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.'

—and *creates a statutory right to recover, not of* the freight paid, but of damages, viz.:

> 'Such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act.'

From this it is clear that, Congress having conferred a statutory right of action, and having imposed a liability to action by Section 8 on the carrier, who shall *'do, or cause to be done, or permit to be done any act, matter or thing in this act prohibited or declared to be unlawful,'* and we may add, *having conferred such right of action without imposing the precedent condition of protest,* it follows that the courts cannot by construction impose on the statutory right a condition which Congress has not imposed. It follows, therefore, that this assignment cannot be sustained. This is in harmony with the holding of the Supreme Court in *United States* v. *Bank of Washington,* 6 Pet. 17, 8 L. Ed. 299, where it was said:

> 'Where money is wrongfully and illegally exacted, it is received without any legal right or authority to receive it; and the law, at the very time of payment, creates the obligation

> to refund it. A notice of intention to recover back the money does not, even in such cases, create the right to recover it back. That results from the illegal exaction of it; and the notice may serve to rebut the inference that it was a voluntary payment or made through mistake.' ''

The above case went to the United States Supreme Court. That court held that the Circuit Court of Appeals erred in certain particulars and sent the case back to the trial court for a new trial. However, the Supreme Court held by implication that the foregoing ruling of the Circuit Court of Appeals was correct. (*Penn. R. R. Co.* v. *International Coal Co.,* 230 U. S. 184).

The ruling of the Circuit Court of Appeals for the Third Circuit in *Penn. R. R. Co.* v. *International Coal Co., supra,* was followed in *Mitchell Co.* v. *Penn. R. R. Co.,* 181 Fed. 403, 401.

**5. THAT THE EVIDENCE SOUGHT TO BE INTRODUCED BY PLAINTIFF IN ERROR FAILS TO SHOW THAT THE RAILROAD COMMISSION RELIEVED PLAINTIFF IN ERROR FROM THE PROVISIONS OF SECTION 21 OF ARTICLE XII OF THE CONSTITUTION AGAINST CHARGING LESS FOR THE LONGER THAN FOR THE SHORTER HAUL.**

This evidence was offered in support of the seventh special defense alleged in the answer. That defense was as follows (Record pg. 342):

> "For a seventh further and separate defense, defendant states that as to each and all of the shipments referred to in plaintiff's separately stated causes of action, which moved or were delivered after October 10, 1911, the Railroad Commission of the State of California, pursuant to Section 21, Article XII, California Constitution, as amended October 10, 1911, authorized defendant, after investigation, to charge more for the shorter distance to the point intermediate San Francisco and Los Angeles to which such shipment was transported than for the longer distance in the same direction."

This defense applied to the causes of action number 86 to 120, inclusive.

It is not contended by plaintiff in error that the evidence offered and rejected supports this defense but counsel for plaintiff in error seem to be under the impression that it was admissible nevertheless. The contention of plaintiff in error is stated at page 108 of its brief as follows:

> "That the Commission did pursuant to the power given it by the Eshleman Act, Section 15, to fix rates, actually make a series of orders, some

> of them preceding the filing of petitions for relief from the long and short haul clause and some of them afterwards, but all of them with the intention of preserving the status of the rates then being charged by plaintiff in error, until it could be determined by the Commission whether, and, if so to what extent, it was entitled to relief."

The first argument made under this head is that the reference to the Act of 1911 (Eshleman Act) in Section 22 of Article XII as amended October 10, 1911, is some unexplained way made legal the rates which plaintiff in error was charging on October 10, 1911, although such rates contravened the provisions of Section 21 of Article XII as it existed prior to and at the time of such amendment. The provisions of the amended Section 22 of Article XII referring to the Act of 1911 are as follows:

> "The provisions of this section shall not be construed to repeal in whole or in part any existing law *not inconsistent herewith,* and the 'Railroad Commission Act' of this State, approved February 10, 1911, shall be construed with reference to this constitutional provision and any other constitutional provision becoming operative concurrently herewith. And the said Act shall have the same force and effect as if the same had been passed after the adoption of this provision of the Constitution and of all other provisions adopted concurrently herewith, except that the three commissioners referred to in said Act shall be held and construed to be five commissioners."

Plaintiff in error refers to Section 15 of the Act of 1911 giving the Commission power to fix rates and

also to Section 18 of the Act to the effect that all rates established shall remain in effect until changed by the Commission. Referring further to the above quoted provision of Section 22 of Article XII plaintiff in error states:

> "It was evidently the intention of the Section not to give the long and short haul clause therein contained an immedate and arbitrary operation without giving the carrier an opportunity to apply for relief."

This argument is based upon the erroneous assumption that the Commission prior to October 10, 1911, had the power to establish rates which violated the express provisions of Section 21 of Article XII of the Constitution. This matter will be discussed under the next head of this brief and need not be further referred to here.

*Even if such rates were legal prior to October* 10*th,* 1911, *they would become illegal immediately upon the adoption of the amendment of October* 10*th,* 1911. There is nothing in the amendments to the Constitution then adopted, or in the Eshleman Act, referred to therein, which prevents such rates from becoming illegal immediately upon the adoption of the long and short haul prohibition of Section 21, as amended. *Even if prior to October* 10*th,* 1911, *the Commission had the power to ignore the prohibition of the Constitution and to fix rates in contravention thereof, such rates became unlawful after October* 10*th,* 1911.

We may assume, for the purpose of this argument, that prior to October 10th, 1911, there was no prohibition against charging more for the short than for the long haul. In such a case there could be no

question but that the carrier at and prior to the time of the amendment to Section 21, would have been legally entitled to charge more for the short haul. But immediately upon the adoption of the amendment of October 10th, 1911, such charge became unlawful. Section 21, as amended, provided for an application to the Commission for relief, *and until this application was granted the exaction of charges in contravention of the prohibition was unlawful.*

Section 21 of the Constitution, as amended October 10th, 1911, contained no *proviso* such as is contained in Section 4 of the Interstate Commerce Act, as amended June 18th, 1910. That *proviso* was deemed necessary by Congress in order to prevent the prohibition from applying at once.

The long and short haul provisions of Section 21 of Article XII were adopted from Section 4 of the Interstate Commerce Act as amended June 18, 1910, but in adopting them the people eliminated the *proviso* of Section 4 continuing existing rates in effect. This proviso of Section 4 which was not made a part of Section 21 of Article XII as amended is as follows:

> "*Provided,* further, that no rates or charges lawfully existing at the time of the passage of this amendatory Act shall be required to be changed by reason of the provisions of this section, prior to the expiration of six months after the passage of this Act, nor in any case where application shall have been filed before the Commission, in accordance with the provisions of this section, until a determination of such application by the Commission."

This *proviso* in Section 4 was deemed expedient in view of the fact that the carriers were at the time of

amendment lawfully charging more for the short than for the long haul. The intention was doubtless to allow time to readjust their charges so that there would be no sudden change in rates. If this *proviso* had not been contained in the section it is clear that the prohibition would be construed as taking effect at once, and that a violation would only be justified after relief had been granted by the Commission.

Even if a greater charge for the short than for the long haul had been legal at the time of the amendment to Section 21 on October 10, 1911, it is quite clear that the prohibition would have become absolute at once as it contains no *proviso* such as is contained in Section 4 of the Interstate Commerce Act.

But as a matter of fact at the time of the amendment of October 10th, 1911, such charges were then illegal. Even in a case where they were legal at the time of enactment of the prohibition Congress deemed it necessary to insert a *proviso* that they could be continued pending the decision of the Commission on application for relief; but *here they were already illegal and no such proviso was attached to the prohibition. Congress was about to prohibit the doing of an act which was then legal whereas the people of California in amending Section* 21 *intended to permit in the future and under certain conditions the doing of an act which theretofore had been illegal.* For many years before and at the time the amendment of October 10th, 1911 went into effect a greater charge for a short than for a long haul was illegal. Hence there was no occasion for a "temporary order of relief." The amendment to the Constitution granted on certain conditions a favor which prior to its enactment the carrier could not under any circumstances obtain. In the case of the amendment to Sec-

tion 4 of the Interstate Commerce Act a hardship might have been imposed if temporary relief were not granted, but here the carrier would be permitted to take advantage of its own wrong if a readjustment of its rates were necessary. It is clear that if the carrier had been obeying the law as it existed prior to October 10th, 1911, there would be no occasion for an "order for temporary relief."

Let us now consider the contention of plaintiff in error that the Court erred in sustaining the objections of defendant in error to the various orders of the Commission. The orders were offered in evidence in support of the seventh defense quoted above. That defense was based upon the proviso of Section 21 of Article XII, reading as follows:

> "It shall be unlawful for any railroad or other transportation company to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter haul being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates. Provided, however, that upon application to the Railroad Commission provided for in this Constitution such company may, in special cases, after investigation, be authorized by such Commission to charge less for longer than for shorter distances for the transportation of persons or property, and the Railroad Commission may from time to time prescribe the extent to which such company may be relieved from the prohibition to charge less for the longer than for the shorter haul."

There is no question as to the meaning of this proviso. It required the carrier who desired to be relieved from the prohibition to file its application for relief and it required an investigation by the Commission and an order of relief in special cases. The provisions of the Constitution are mandatory and prohibitory unless by express words they are declared to be otherwise. (Section 22, Article I.)

*The evidence offered by plaintiff in error conclusively shows that the Commission has never investigated the application of plaintiff in error. In fact, the applications themselves were not filed until December* 30, 1911. We will take up seriatim the various orders of the Commission which plaintiff in error offered in evidence.

The first document offered in evidence was not an order but a notice, dated October 20th, 1911 (Record, page 481). As stated at page 117 of the brief of plaintiff in error, this notice recited the provisions of the amended Section 21 of the Constitution and directed carriers who had on file schedules violating such provisions to file, on or before January 2, 1912, "application or applications to be relieved from the provisions" of the amended Section 21, the form of the application being prescribed in the notice.

On November 20, 1911, the Commission made the following order (Record, page 404):

> "To All Railroads and Other Transportation Companies Within the State of California.
>
> "Permission is hereby granted to railroads and other transportation companies until January 2d, 1912, to file for establishment with the Commission in the manner prescribed by law and

in accordance with the Commission's regulations, such changes in rates and fares as would occur in the ordinary course of their business, continuing, under the present rate bases or adjustments, higher rates or fares at intermediate points; provided, that in so doing the discrimination against intermediate points is not made greater than that in existence October 10th, 1911, except when a longer line or route desires to reduce rates or fares to the more distant point for the purpose of meeting by a direct haul reduction of rates or fares made by the shorter line.

"*The Commission does not hereby indicate that it will finally approve any rates and fares that may be filed under this permission or concede the reasonableness of any higher rates to intermediate points, all of which rates and fares will be investigated at the hearing to be held January 2d,* 1912."

As yet there was neither an application by the carrier nor an investigation by the Commission.

The next documents offered in evidence were the applications of plaintiff in error for relief which were in the form prescribed by the Commission (Record, page 407 *et seq*). These applications were filed December 30, 1911. The Court sustained the objection to these applications upon the ground that they were irrelevant as the evidence failed to show that they had been granted in whole or in part.

The following admission was made by plaintiff in error with relation to these applications (Record, page 406):

"Mr. BOOTH.—*These petitions may be con-*

*sidered to have been pending until May* 27, 1912. *They had not been specifically acted upon either prior to that time or since that time,* except in so far as the decision in Case 116, which I am going to offer shortly, may be considered to have affected them."

The next document offered in evidence was a certified copy of the minutes of a meeting the Railroad Commission held on January 2, 1912 (Record, page 423). This document was as follows:

"In the matter of Case No. 214 entitled 'In the matter of the provisions of Section 21 of Article 12 of the Constitution of California relating to long and short hauls and through rates exceeding aggregate of intermediate rates,' set for hearing at this time and place, the Commission proceeded to a hearing of the same. The following appearances were entered:

"G. J. Bradley of the Merchants and Manufacturers' Association of Sacramento.

"W. E. Wheeler and Seth Mann of the Traffic Bureau of the Merchants' Exchange.

"F. R. Hill of the Fresno Traffic Association.

"F. P. Gregson of the Associated Jobbers of Los Angeles.

"G. W. Luce and C. W. Durbrow of the Southern Pacific Company.

"Edward Chambers and H. P. Anewalt of the Atchison, Topeka & Santa Fe Railway.

"E. S. Pillsbury of Wells, Fargo & Company Express.

"Archibald Gray and C. H. Helting of the Western Pacific Railway.

"William Henshaw of the Southern California Cement Company.

"Discussion was held until 11:05 A. M.

"(See Reporter's Transcript.)"

Regarding this meeting of the Commission, the following admission was made by plaintiff in error (Record, page 423):

"Mr. BOOTH.—That is a copy of the minutes of the Railroad Commission reciting that on January 2, 1912, Case 214 came on for hearing. *There was a discussion held, but no evidence introduced, nothing further done; it was postponed without day.*"

The next document offered in evidence was an order of the Railroad Commission dated January 16, 1912 (Record, page 424). This order was as follows:

"It is hereby ordered that the time heretofore granted to the railroad and other transportation companies of the State within which to file with this Commission new schedules removing deviations from the provisions of Section 21 of Article XII of the Constitution of this State, or in case it is decided to justify the same, or any of them, applications to be relieved from the provisions of said section, be and the same is hereby extended to February 15, 1912, at which time said schedules or applications must be filed with this Commissioner. As to any rate or fare as to which neither such schedule nor such application has been filed with this Commission by said date,

the provisions of said Section 21, of Article XII, of the Constitution will at once become operative, and the lower rate or fare for a longer distance will become the maximum rate or fare for all intermediate points on the same line or route for movements in the same direction, the shorter haul being included within the longer distance, and the aggregate of the intermediate rates or fares will become the through rate or fare in cases in which the through rate or fare is now in excess of the aggregate of the intermediate rates or fares.

"Until February 15, 1912, the railroad and other transportation companies may file for establishment with the Commission in the manner prescribed by law and in accordance with the Commission's regulations such changes in rates and fares as would occur in the (268-47) ordinary course of their business, continuing, under the present rate bases or adjustments, higher rates or fares at intermediate points: Provided that in so doing the discrimination against intermediate points is not made greater than that in existence October 10, 1911, except when a longer line or route desires to reduce rates or fares to the most distant point for the purpose of meeting by a direct haul reduction of rates or fares made by the shorter line. *The Commission does not hereby indicate that it will finally approve any rates and fares that may be filed under this permission or concede the reasonableness of any higher rates to intermediate points, all of which rates and fares will be subject to investigation and correction.*

> "And be it further ordered that the Secretary be and he is hereby ordered to serve a copy of this order on each of said railroad and other transportation companies and to notify each of them to comply with all requirements hereof.
>
> "Dated: January 16, 1912."

The mere inspection of these orders of the Commission is sufficient to show that they were not made after investigation. The fact is that the Railroad Commission erroneously assumed that it had the power to permit carriers to violate the prohibition *pending investigation*. The Railroad Commission assumed in effect that they could add to the constitutional prohibition a proviso somewhat similar to that which Congress annexed to the prohibition of the Fourth Section of the Interstate Commerce Act by the Amendment of June 18, 1910, but which the people of California, for obvious reasons, did not adopt as a part of the amended Section 21.

Not only was there no investigation, but prior to December 30, 1911, there were no applications to investigate.

Plaintiff in error seeks to draw a distinction between the causes of action accruing prior and subsequent to January 16, 1912, the date of the order last quoted, *supra*. It is said:

> "As to every claim of the defendant in error originating after January 16, 1912, the Commission had, after investigation, entered an order temporarily at least continuing the rates described in the application of December 30, 1911, in full force and effect."

It is very clear, however, that there is no foundation for this alleged distinction. The order itself expressly negatives plaintiff in error's assumption that there had been any investigation. It provides:

> "The Commission does not hereby indicate that it will finally approve any rates and fares that may be filed under this permission or concede the reasonableness of any higher rate to intermediate points, *all of which rates and fares will be subject to investigation and correction.*"

Moreover, it was expressly admitted by plaintiff in error that the applications filed on December 30, 1911, "may be considered to have been pending until May 27, 1912. They had not been specifically acted upon either prior to that time or since that time except in so far as the decision in Case No. 116 may be considered to have affected them."

With respect to the meeting of the Commission held on January 2, 1912, it was admitted by plaintiff in error that *"There was a discussion held, but no evidence introduced, nothing further done; it was postponed without day."*

It is apparently the contention of plaintiff in error that by its orders of November 20, 1911, and January 16, 1912, the Commission gave some sort of authority to plaintiff in error to charge the rates complained of in the complaint herein.

The order of November 20, 1911, purported to give carriers

> "permission until January 2, 1912, to file for establishment with the Commission in the manner prescribed by law and in accordance with the Commission's regulations, such changes in rates

> and fares as would occur in the ordinary course of their business, continuing, under the present rate bases or adjustments, higher rates or fares at intermediate points; provided that in so doing the discrimination against intermediate points is not made greater than in existence October 10, 1911."

This order purported to permit the carriers to continue "under present rate bases or adjustments" higher rates to intermediate points provided that the discrimination against intermediate points was not greater than in existence on October 10, 1911. *But on October* 10, 1911, *there were no legal rates which discriminated against any intermediate points.* The order, therefore, was a nullity. Even if there had been applications for relief on file before it was made and even if the Commission had investigated such applications, the order could not under any possible view have amounted to an order of relief.

What the Commission had in mind in making an order of this kind can only be explained when we come to consider the opinion in the *Scott, Magner & Miller case.* In that case the Commission expressed the view that prior to October 10, 1911, it had the power to establish rates which contravened the provisions of Section 21 of Article XII. The decision of the Commission in that case will be further considered under the next head of this brief, when the contention of plaintiff in error that the Railroad Commission could establish rates which contravened the constitutional provision will be replied to.

The order of January 16, 1912, contained the same provision as that contained in the order of November 20, 1912, above quoted (Record, page 426). It was

equally a nullity. Prior to its date the plaintiff in error had filed applications for relief; but even if (which is not the fact) the Commission had investigated these applications, the order of January 16, 1912, could not have amounted to an order granting them in whole or in part. It made no reference to the applications on file nor to the deviations specified therein. It merely purported to allow all carriers to discriminate against intermediate points to the extent that such discrimination existed on October 10, 1911. As no discrimination existed on that date the order, viewed as an order attempting to grant relief, would have been void on its face.

Plaintiff in error contends that the order of January 16, 1911, was made after "investigation." As we have already seen, however, the order on its face expressly states that the investigation is to be in the future. We need not reply to the argument of plaintiff in error that the Commission could investigate those applications "*ex parte,* and from its own records supplemented by its general knowledge of the California situation."

If the order of January 16, 1912, had in terms granted the applications on file, either in whole or in part, it might be presumed that an investigation had been made. But the order makes no mention of the applications of plaintiff in error. It merely contains a general order purporting to permit the continuance of the discrimination "in existence on October 10, 1911," and expressly states that the Commission "does not indicate that it will finally approve any rates and fares that may be filed under this permission or concede the reasonableness of any higher rate

to intermediate points, all of which rates and fares *will be subject to investigation and correction.*"

The order does not purport to be any different from the order of November 20, 1911, which was made before any applications were filed. The order of November 20th stated that "rates and fares will be investigated at the hearing to be held on January 2, 1912." No evidence was introduced at this hearing, and the matter was adjourned *sine die*. The order of January 16, 1912, did not state at what time the future investigation referred to would be held.

Plaintiff in error suggests that on November 20, 1911, the Commission had the power to fix rates, pending investigation, though such rates did not conform to the long and short haul clause. It is said that "by its chain of orders offered by plaintiff in error" the Commission "did establish the rates which were being charged by the carriers on October 10, 1911, as the rules which should govern such carriers who choose to file their applications until their application could be finally determined and passed upon."

This contention is based upon the provision of Section 22 of Article XII as amended October 10, 1911, to the effect that no existing law "not inconsistent herewith" should be repealed, and that the Act of 1911 should have the same force and effect as if it had been passed after the adoption of the amendments to the Constitution.

Before replying to the contention that this provision of Section 22 authorized the Commission to establish rates violative of the long and short haul clause of Section 21 without the application and investigation therein provided for, let us first see if the

Commission attempted so to do by its orders of November 20, 1911, and January 16, 1912.

The most cursory inspection of these orders is sufficient to show that they do not purport to establish any rates. The order of November 20, 1911, purports to grant "Permission to railroads and other transportation companies until January 2, 1912, to file for establishment with the Commission in the manner prescribed by law, such changes in rates and fares as would occur in the ordinary course of business, continuing under the present bases or adjustments, higher rates or fares at intermediate points." The order concludes with the statement that the Commission does not indicate that it will finally approve any rates or fares filed under this permission, all of which will be subject to the investigation to be held on January 2, 1912.

The order of January 16, 1912, is the same in this respect as the order of November 20, 1911.

It is very apparent that these orders did not purport to establish any rates.

We will now reply to the contention that the Commission could establish rates violative of the long and short haul clause of Section 21 of Article XII without the application or investigation provided for in the section.

In support of this contention plaintiff in error quotes the following provision of Section 22 of Article XII as amended:

> "No provision of this Constitution shall be construed as a limitation of the authority of the Legislature to confer upon the Railroad Com-

> mission additional powers of the same kind, or different, from those conferred herein *which are not inconsistent with the powers conferred upon the Railroad Commission in this Constitution,* and the authority of the Legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this Constitution."

Under this provision plaintiff in error contends that the Legislature might confer upon the Commission the power to establish rates violative of the long and short haul provision of Section 21 without the application or investigation prescribed by that section and necessarily not in the "special cases" referred to in Section 21.

But it is plain that such a statute would be wholly inconsistent with the powers conferred upon the Commission by the long and short haul clause of Section 21. *Such a statute would practically supersede or repeal the long and short haul clause of the Constitution.* Although the Legislature may confer upon the Commission powers in addition to those conferred by the Constitution, yet such powers must not be inconsistent with the powers conferred by the Constitution. The Constitution contains the law relating to long and short hauls and confers upon the Commission certain powers in relation thereto. The manner in which relief from the prohibition can be obtained is specifically pointed out. *It necessarily follows that a statute providing that relief may be obtained in a different manner would be inconsistent with the Constitution.*

All that was decided by the Supreme Court in *Pacific S. T. & T. Co.* v. *Eshleman,* 166 Cal. 660, was

that the above quoted provision of Section 22 authorized the Legislature to confer upon the Commission such powers as it may seem fit "even to the destruction of the safeguards, privileges and immunities guaranteed by the Constitution to all other kinds of property and its owners." The Supreme Court held that an act of the Legislature conferring powers upon the Commission was "supreme over all constitutional provisions." In using the language quoted above the Supreme Court of California was replying to the contention of the Telephone Company that the Public Utilities Act in conferring upon the Commission the power to require a telephone company to permit a physical connection between its lines and the lines of a competing company violated the provisions of the State Constitution against the taking of private property for a public purpose without first making compensation. The Supreme Court held that the Legislature in conferring power upon the Commission was not bound by this constitutional provision. But the Court expressly stated that *the Legislature had no power to confer upon the Commission any power inconsistent with the provisions of the Constitution relating to the Railroad Commission.* The Supreme Court held:

> "If the Railroad Commission had acted in conformity with the powers granted to it by the Legislature, the validity of the order cannot be questioned in the Supreme Court or elsewhere under a claim of violation of any provision of the State Constitution *other than the provisions relating to the Railroad Commission.*

In this connection, as we have seen, the plaintiff in error again reverts to the Eshleman Act (the Act of 1911) which, as provided by Section 22 of Article

XII, had the same force as if enacted after the amendment to the Constitution. Referring to the Eshleman Act, plaintiff in error states:

> "It is apparent that the Legislature by it intended to confer upon the Railroad Commission the broadest and most untrammeled power with respect to the fixing of rates."

But why, it may be asked, is it necessary to go to the Eshleman Act to sustain the power of the Commission to fix rates? Section 22, Article XII, of the Constitution itself is just as broad as the Eshleman Act, as that section confers upon the Commission the "power to establish rates and charges for the transportation of passengers and freight by railroads and other transportation companies."

Why did not plaintiff in error simplify its argument by contending that the power conferred upon the Commission by Section 22 to fix rates authorizes the Commission to fix rates violative of the long and short haul provision of Section 21 without either the application or investigation required by the last mentioned section?

The reason why the contention was not made in this form is apparent. The contention if made in this form would refute itself, and, furthermore, in view of the provision of Section 22 quoted above, to the effect "no provision of this Constitution shall be construed as a limitation upon the authority of the Legislature to confer upon the Railroad Commission additional powers * * * which are not inconsistent with the powers conferred upon the Railroad Commission in this Constitution," it was probably deemed advisable to base the power of the Commission to fix

rates upon an act of the Legislature rather than upon the Constitution itself.

In view of the terms of the orders of November 20, 1911, and January 16, 1912, and in view also of the admissions that the applications filed on December 30, 1911, were never acted on and were still pending at the time of the trial, and that at the hearing held on January 2, 1912, no evidence was introduced and nothing was done, the meeting adjourning without day, it is hardly conceivable that plaintiff in error is serious in its contention that the evidence offered supported its seventh separate defense.

## 6. THE RAILROAD COMMISSION HAS NO POWER TO ESTABLISH RATES CONTRAVENING THE CONSTITUTIONAL PROVISION, AND IF IT ASSUMED TO DO SO ITS ACT WAS VOID.

The position of the plaintiff in error is that the Railroad Commission "established" the rate collected, that it thereupon became "conclusively just and reasonable," and it was legally entitled to charge accordingly. The answer to this contention is that the act of the Commission in attempting to establish such act and the rate itself were unconstitutional.

The provisions of the long and short haul clause of Section 21 of the Constitution of 1879 and the provisions of Section 22 thereof do not conflict. The provisions of both sections can be given full effect by holding *that neither a carrier nor the Commission can violate the positive prohibition of the Constitution—that the Commission can not establish a higher rate for the short than for the longer haul—that all rates must conform to the requirements of the long and short haul provision of Section* 21.

In reason how can it be said that the people intended that the Commission could make legal what a carrier itself was positively forbidden to do? The people said that no greater charge should be made for the short than for the longer haul. This prohibition did not specify the carrier but was against any such charge. If the carrier made such a rate it was illegal, and the Commission could have no power to legalize it by "establishing" it.

Let us assume that instead of containing the provision that it was the duty of the Commission to establish rates and the provision that the rates so established should be deemed conclusively just and

reasonable, the Constitution contained a provision that it was the duty of the *Legislature* to establish rates, and that the rates so established should be deemed conclusively just and reasonable.

If the Legislature had attempted to enact a statute which on its face ran counter to the provision of the Constitution by "establishing" a less rate for a longer haul, would not the statute fixing the long and short haul rates be held *unconstitutional* and not binding upon the carrier or any other person?

The courts have held in innumerable cases that an act of the Legislature attempting to override the Constitution is void. And yet the position of the Commission here is identical with that of the Legislature and it is bound by the same prohibition against establishing unconstitutional rates as the Legislature is against enacting an unconstitutional statute.

If the Constitution had omitted any provision that the Legislature or the Commission should establish rates, the Legislature would have had that power to the same extent as it is conferred upon the Commission by Section 22.

Let us assume that the Constitution contained only the long and short haul clause and that the Legislature in pursuance of its plenary power had established rates which contravened that section, *can it be doubted that the act prescribing such rates, in so far as it violated the inhibition of the Constitution, would be held unconstitutional and void?*

Section 22 of Article I of the Constitution reads as follows:

"The provisions of this Constitution are man-

datory and prohibitory, unless by express words they are declared to be otherwise."

In *Matter of Maguire,* 57 Cal. 604, the Supreme Court considered the effect of Section 18 of Article XX of the Constitution, which reads as follows:

> "No person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation, or profession."

An ordinance of the City and County of San Francisco purported to make it unlawful and a misdemeanor for any female to wait on any person in any dance hall or bar-room. In holding the ordinance unconstitutional the Court, per Mr. Justice Thornton, said:

> "It is said that this is nothing more than the exercise of the police power which is vested in the city and county by Section 11 of Article XI of the Constitution. *But is this provision in relation to the police power in the Constitution beyond the restriction of the section we have been examining?*
>
> *"To arrive at the meaning of the Constitution, as of any other writing, the whole of it must be examined. If there is apparent conflict, it is the duty of the courts to harmonize them, if it can be reasonably done, so as to give effect to every portion of the instrument. It is not to be supposed that an instrument of this character, every section of which was fully considered, has been framed with contradictory provisions. What was provided in one section may be restrained by the provisions of another.*
>
> *"The Section* 18 *of Article XX imposes a restraint on every law-making power in the State, whether an act of the Legislature, or an ordinance or by-law of a municipal corporation. It*

*is a positive declaration, made by the sovereign authority, that whatever may be done under the legislative power, in any and every shape or form, shall never, by direct or indirect action, incapacitate any person on account of sex from entering upon or pursuing any lawful business, vocation, or profession. This power to make police regulations is as much restrained by the section just referred to as is the legislative power vested in the Senate and Assembly. Both grants of power are alike made by the Constitution, and both are alike restrained by this section of Article XX.*

"It may be further said of it that it is prohibitory in its character, and needs no legislation to make it active in its effect. It is self-executing, and struck with nullity all acts in existence inconsistent with it as soon as the Constitution went into operation, and all since passed. (*McDonald* v. *Patterson,* 54 Cal. 245.)

"We have carefully weighed the arguments addressed to us on the point of immorality. But we must presume that all these considerations were discussed and weighed by the convention which framed the Constitution, and the people who adopted it; that they fully considered on the one hand the benefits which would spring from the adoption of a policy like that established by the section and the ban on the other; and that on a just and fair balancing of the resulting good and evil they determined to have the section as it is, as fixing and carrying out a policy, in their judgment, the best under the circumstances. *As we understand the section, it does establish, as the permanent and settled rule and policy of this State, that there shall be no legislation either directly or indirectly incapacitating or disabling a woman from entering on or pursuing any business, vocation, or profession permitted by law to be entered on and*

*pursued by those sometimes designated as the stronger sex. To adopt the conclusion to which the reasoning of the counsel for the people would lead us would be, in our judgment, to insert an exception to the general rules prescribed by this section.* But there are no exceptions in the section, and neither we nor any other power in the State have the right or authority to insert any, whether on the ground of immorality or any other ground. All these are considerations of policy, the determination of which belonged to the convention framing and the people adopting the Constitution; and their final and conclusive judgment has been expressed and entered in the clear and unmistakable language of the Constitution itself, declaring the rule as above stated. *The policy of the ordinance is inconsistent with the policy intended and fixed by the Constitution. They cannot both stand.*

"The Constitution furnishes a rule for its own construction. That rule is that its provisions are mandatory and prohibitory, unless by express words they are declared to be otherwise (Art. 1, Sec. 22). We find no such express words in the Constitution. *This rule is an admonition placed in this, the highest of laws in this State, that its requirements are not meaningless, but that what is said is meant, in brief, 'we mean what we say'. Such is the declaration and command of the highest sovereignty among us, the people of the State, in regard to the subject under consideration."*

*So here the provision of Section* 22 *empowering the Commission to establish rates is not beyond the restraint of Section* 21. Nor is it to be supposed that these provisions are contradictory, nor that what is "provided in one section may not be restrained by the provisions of another." Equally

with Section 18 of Article I, Section 21 of Article XII "imposes a restraint on every law making power in the State and is a positive declaration made by the sovereign authority that whatever may be done under the legislative power (or by the Commission) *in any and every shape and form,* shall never by direct or indirect action" violate the positive prohibition of the Constitution. Equally with the ordinance under consideration, in *Matter of Maguire supra,* the so-called "established" rates are "inconsistent with the policy intended and fixed by the Constitution. They cannot both stand."

In *Knight* v. *Martin,* 128 Cal. 245, the Supreme Court had under consideration the provisions of Section 5 of Article XI of the Constitution, providing for the election and compensation of county officers. This section provided that the Legislature

> "shall regulate the compensation of all such officers in proportion to duties, and for this purpose *may* classify the counties by population."

Subdivision 36 of Section 35 of the County Government Act of 1893 assumed to fix the compensation of assistant district attorneys at the sum of $1,500 per annum throughout the State without regard to any classification of the counties for that purpose. In holding unconstitutional this section of the County Government Act the Supreme Court, after referring to the language of the Constitution printed above, quoted the following extract from the opinion of the Court in *Dwyer* v. *Parker,* 115 Cal. 544, where the same constitutional provision was involved:

"When this language is considered with that of Article 1, Section 22, of the same instrument, which declares that 'the provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise,' the conviction is irresistible that the Constitution has prescribed a single mode which must be adopted and followed in fixing the compensation of officers, and that mode is to adjust the compensation in accordance with their respective duties under a classification of counties by population made for this purpose. To hold that the provision concerning classification of counties is permissive merely would be to deny to Section 22 of Article I its plain effect in a case calling for its application, and would likewise be to give to the language itself no possible force of efficacy. It was not necessary to confer upon the Legislature this power to classify, by way of permission. The Legislature would have had that power in any event, unless it had been expressly withheld; and the conclusion, therefore, may not be escaped that the mode designated by the Constitution is mandatory, and is the one and only method contemplated by the Constitution for fixing the compensation of the officers therein mentioned."

In *McDonald* v. *Patterson,* 54 Cal. 247, the provisions of Section 19 of Article XI of the Constitution were under consideration by the Supreme Court. These provisions were as follows:

"No public work or improvement of any description whatsoever shall be done or made, in any city, in, upon or about the streets thereof, or otherwise, the cost and expense of which is made chargeable or may be assessed upon private property by special assessment, unless an estimate of such cost and expense shall be made,

and an assessment, in proportion to benefits, on the property to be affected, or benefited, shall be levied, collected, and paid into the city treasury before such work or improvement shall be commenced, or any contract for letting or doing the same authorized or performed."

Referring to the construction of the foregoing provisions, the Supreme Court said:

"In the construction of this Constitution, the rules expressed in Section 22, Article I, *must always be regarded.* That section declares that 'the provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.'

"Now, in the light of this rule, laid down in words so clear and terms imperative, we will examine the sections above referred to.

"The language of Section 19 of Article II is both mandatory and prohibitory in its character. It is clear and unambiguous. It is difficult to see that it could have been made stronger in its words of command and prohibition. What words more vigorous or more appropriate to their manifest purpose could have been found in the whole compass of the English tongue we are at a loss to determine. It says, as plainly as words can disclose: 'We command that no such work as that referred to shall at any time be done, except as herein set down; and we prohibit any such work from being done at any time in any other way.' It is mandatory and prohibitory to every department of the Government, and every officer of each department. By its very terms it is binding upon all, and goes into effect as soon as the Constitution becomes the organic law, as it is strongly prohibitory. We could not hold otherwise without disre-

garding the plain meaning of the words, and the rule laid down for its interpretation in the 22nd Section of the 1st Article."

In *Navajo Mining, Etc., Co.* v. *Curry,* 147 Cal. 581, the Supreme Court had under consideration the provision of Section 11 of Article XII of the Constitution, which prohibits any increase of the capital stock of a corporation except at a meeting called for that purpose, public notice whereof is required as provided by statute.

In the case before the Court all of the stockholders had consented in writing and the corporation maintained that as the sole object of the statute providing for publication of notice had been accomplished by such unanimous consent the statutory provision should be held merely directory. In holding otherwise the Supreme Court said:

> "There is both reason and authority to sustain this contention as applied to a statute, but in this State we have not only a statute to construe, but a constitutional provision which in express terms prohibits any increase of the capital stock of a corporation 'without the consent of the persons holding the larger amount in value of the stock, at a meeting called for that purpose, giving sixty days' public notice, as may be provided by law.' (Const., Art. XII, Sec. 11.)
>
> "A provision of the Constitution of Missouri substantially identical was held by the Supreme Court of that State to be directory. (*Riesterer* v. *Horton Land and Lumber Co.,* 160 Mo. 141 (61 S. W. 238). But we could not place the same construction upon the above quoted provision of our Constitution *without disregarding not only its expressly prohibitory terms but also*

*the rule prescribed by the Constitution itself for the effect to be given to its provisions.* (Const., Art. I, Sec. 22.)"

The long and short haul clause of Section 21 of the Constitution is equally applicable to carriers, the Legislature and the Commission. *It prohibits a certain method of rate making and rate charging. It is an absolute prohibition binding upon all.* The prohibition of the Constitution if it would render unconstitutional a rate fixed by the Legislature in contravention thereof must also render unconstitutional a rate attempted to be fixed by the Commission in contravention thereof. The duty imposed upon the Commission would, in the absence of the provisions of Section 22, be vested in the Legislature, and because the people saw fit to vest that duty in the Commission it cannot be said that the Commission could violate the positive prohibition contained in Section 21 of the Constitution.

The provision that the rates established shall be deemed conclusively just and reasonable must refer to rates *constitutionally enacted or established.*

In *Scott, Magner & Miller* v. *Western Pacific Railway Company* (Decision No. 579, Case No. 263) before the California Railroad Commission the complainants sought reparation for charges paid on shipments from Livermore to San Francisco on the ground that lower rates were charged to San Francisco from Lathrop, a more distant point. Some of the claims in the *Scott, Magner & Miller* case accrued prior to the amendment to the Constitution of October 10th, 1911, and some after such amendment. With reference to the claims that accrued prior to October 10th, 1911, the Commission held

that the terms of the long and short haul clause of the Constitution of 1879 were not violated because no greater charge was made to a more distant point. In the case under consideration by the Commission a lower rate was charged from Lathrop to San Francisco than from Livermore to San Francisco, but the charge to San Francisco from Livermore did not for that reason violate the constitutional provision because there was no less charge to a more distant point, San Francisco being the terminus of the line. The Commission said:

> "The provisions of the Constitution of 1879, however, look only to the point of destination. The offense under those provisions was not complete unless other transportation was made for a lesser charge to some 'more distant station, port or landing,' *i.e.,* to some point D beyond point C. In the present case, there was no point on defendant's line beyond San Francisco and no lesser charge to any more distant point beyond. Hence, under the facts of this case, no cause of action arose under the long and short haul clause of the Constitution of 1879."

That such is the proper construction of the constitutional provision seems beyond question. It would appear, however, that the Commission did not confine itself to holding that the long and short haul clause of the Constitution of 1879 was not violated, but deemed it advisable to give its views upon matters of law which were not necessary to its decision.

After disposing of the complainant's claim on the ground that there was no violation of the long and short haul provision of the Constitution the Commission considered the long and short haul clause of the so-called Wright Act of March 19th, 1909. The

long and short haul provision of that act read as follows:

> "No common carrier subject to the provisions of this act shall charge or receive any greater compensation in the aggregate for the transportation of passengers or of a like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any such common carrier to charge and receive as great a compensation for a shorter as for a longer distance haul."

It will be noted that the clause of the act prohibited a greater charge for transportation "for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance." In this respect it is similar to the provision of the Interstate Commerce Act and to the provisions of our Constitution as amended October 10, 1911. The provision of the act was in this respect broader than that of the Constitution of 1879 as, unlike the constitutional provision, it prohibited a greater charge for the shorter than for the longer haul *irrespective of whether or not a lesser charge was made to a more distant point.* In this respect, therefore, it applied to the circumstances of the *Scott, Magner & Miller* case, where the charge from Lathrop to San Francisco was lower than the charge from Livermore to San Francisco.

The Commission, therefore, had before it the question as to whether the complainants were entitled

to damages for violation of the clause of the Act of 1909. The provisions of the act, as we have seen, only applied where the conditions were "substantially similar." *In the Scott, Magner & Miller case it was conceded that the rates charged had never been established by the Commission.* Referring to the rights of the complainants under the Act of 1909, the Commission said:

> "If the Railroad Commission had established the rates to be charged by this defendant for both longer and shorter hauls, it might well be held that the defendant could not thereafter, as long as it conformed to the rates so established, be compelled to pay for a violation of the long and short haul clause. Otherwise, the defendant would have been compelled to pay damages if it charged the rates established by the Commission and also a fine up to $20,000 for each offense if it failed to charge those rates. It would be compelled to pay both if it obeyed and if it disobeyed the Railroad Commission's order. There would be much reason for holding that after the Railroad Commission had established the rates, as commanded by Section 22 of Article XII of the Constitution, the long and short haul clause of the Constitution would no longer avail a shipper except as a basis for an application to the Commission to change the rates established by it so as to conform to the long and short haul principle established by the Constitution. It becomes unnecessary, however, to consider this question further at this time for the reason, as heretofore stated, that the Railroad Commission did not during the period of the Wright Act establish the rates charged or to be charged by defendant on movements of hay transported between the points specified in the complaint in this case. Those rates were railroad-made rates and not State-made rates. As heretofore

> stated, if the circumstances and conditions surrounding the longer and the shorter haul movements were substantially similar, a substantive right to compensation arose under the Wright Act."

The Commission had held that there was no violation of the Constitution because the Constitution did not apply unless there was a lesser charge to a more distant point. Therefore it was not concerned with the long and short haul clause of the Constitution of 1879. It was also an admitted fact that the rates charged in the *Scott, Magner & Miller* case were never established by the Commission; therefore there was no occasion for a determination as to whether or not the Commission could "establish rates which contravened the prohibition of Section 21 of the Constitution." The statements of the Commission set forth above are therefore merely *dicta*. Moreover, as shown by the foregoing quotation from the opinion of the Commission, it was not the intention of the Commission to finally pass upon this point. *The Commission expressly declined to further consider the question on the ground that it was not involved.*

Moreover, the Commission was not concerned with the long and short haul clause of the Constitution of 1879, but only with the clause of the Act of 1909, which covered cases to which the provision of the Constitution did not apply. It may well be that the clause of the Act of 1909 could not be construed so as to prevent the Commission from establishing rates contravening that clause *insofar as that clause went beyond the terms of the long and short haul clause of the Constitution*, for the duty to establish rates was constitutionally enjoined upon the Commission and it would seem that no act of the Legislature

could control that power. The quotation from the opinion of the Commission shows that the Commission confused the prohibition of the Constitution of 1879 with the long and short haul clause of the Act of 1909.

There is no reason why the long and short haul clause of Section 21 should be restricted to carriers and should not operate equally against the Legislature or the Commission. Nor is there any foundation for the dictum of the Railroad Commission that this prohibition "is based on the theory of railroad-made rates." There is nothing in the terms of the Constitution restricting it to carriers and it formed a part of the same Constitution containing Section 22, which provided that it should be the duty of the Commission to establish rates.

By such construction a prohibitory clause of the Constitution is reduced to a rule for the guidance of the Commission which the Commission may follow or disregard at its pleasure.

*It will also be observed that under this construction the absolute long and short haul clause of the Constitution would be less absolute than the clause as it at present exists, for under the Constitution as it now exists the Commission can only relieve in special cases after investigation, whereas if such were the proper construction, the Commission could, prior to the amendment of October* 10*th,* 1911, *have wholly disregarded the prohibition without any investigation.*

In 1906 Section 15 of the Interstate Commerce Act was amended so as to confer upon the Interstate Commerce Commission the power to establish rates.

Section 15 as so amended contained the following provision:

> "That the Commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon a complaint made as provided in Section Thirteen of this Act, or upon complaint of any common carrier, it shall be of the opinion that any of the rates, or charges whatsoever, demanded, charged, or collected by any common carrier or carriers, subject to the provisions of this Act, for the transportation of persons or property as defined in the first section of this Act, or that any regulations or practices whatsoever of such carrier or carriers affecting such rates, are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, *to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged.*"

In 1910 the Fourth Section was amended by striking out the words "under substantially similar circumstances and conditions" and by adding the provision for an application to the Commission for relief from what then became an absolute prohibition against the charging of more for the short than for the long haul.

At the time of the Amendment of 1910 to the Fourth Section, there were many members of Congress who favored an absolute prohibition against charging more for the short than for the long haul and the section as then amended was a compromise

between these members and those who believed an absolute prohibition inexpedient.

In the *Intermountain Cases*, 21 I. C. C. 334 (decided June 22, 1911), Commissioner Lane said:

> "The section was the result of a compromise between the two elements in the national legislature which had been compromising as to this section ever since the act to regulate commerce was first proposed. There have been those who favored an absolute prohibition and those who favored a prohibition with exceptions. When these two forces met, after long and fruitless discussion, the present compromise section was suggested. This, it is said, was acceptable to the radicals—the absolutists, so to speak—for they believed that without these words "under substantially similar circumstances and conditions" in the act the proviso (viz.: the proviso that the Commission could relieve from the prohibition) would be unconstitutional and the provision would become clearly mandatory and a perfect prohibition against the charging more for the shorter than the longer distance."

*If in* 1910 *the advocates of an absolute long and short haul clause had succeeded in amending the Fourth Section according to their views, could it be said that the Interstate Commerce Commission nevertheless had the power to "establish" rates which would conflict therewith?*

*And at the present time under the Fourth Section as it now exists can it be said that the Interstate Commerce Commission has the power to "establish" rates which violate the prohibition of the Fourth Section in a case where no application has been made for relief under the proviso of the Fourth Section and*

*where no relief has been granted pursuant to such application?*

We think it must be apparent that the Interstate Commerce Commission has no such power; that its action in establishing rates must be governed by the provisions of the Fourth Section; and that any rates established in violation of the prohibition of the Fourth Section are illegal and void.

In the *Scott, Magner & Miller* case, *supra,* the Railroad Commission of California suggests that after the rates had been established by the Commission the long and short haul clause would no longer "avail a shipper *except as a basis for an application to the Commission to change the rate established by it so as to conform to the long and short haul principle established by the Constitution.*"

By this course of reasoning the Commission is entitled to wholly disregard the prohibition of the Constitution in establishing rates; but in its discretion may consider the prohibition as a "principle" in establishing rates. That generally there shall be no greater charge for the short than for the long haul is one of the established rules of rate making and if there were no such prohibitory clause in the Constitution the Commission could consider that rule in *establishing* or *changing* rates. By such construction the prohibition of the Constitution is wholly nullified.

Is it conceivable that the advocates of an inflexible long and short haul clause in the Interstate Commerce Act supposed that the Interstate Commerce Commission could "establish" rates in violation thereof? As we have seen, the long and short haul provision prohibits a certain method of rate making,

and must be an absolute prohibition binding upon all. No reason has ever been suggested why a rate-making body such as the Railroad Commission cannot make its rates conform thereto. Nor is there anything in the duty of establishing rates inconsistent with a provision of law that in establishing them a prohibition against establishing certain kinds of rates shall be observed. The purpose of the long and short haul clause is to prevent a method of rate making which is deemed contrary to public policy and inimical to the best interests of the commonwealth. No reason can exist why the prohibition is not as equally binding upon a rate-making body as upon the carrier.

*The clearly expressed purpose of the people can be effected only by construing this prohibition as rendering unconstitutional rates attempted to be established by the Commission in contravention thereof.*

In the brief of plaintiff in error it is said that the provisions of Sections 21 and 22 of the Constitution of 1879, are to be construed "in *pari materia* and must harmonize, or one or the other of the two apparently conflicting provisions become meaningless."

But, as we have seen, the provisions of Sections 21 and 22 of the Constitution of 1879, do not conflict. Plaintiff in error has made not the slightest attempt to show wherein they conflict.

In support of its contentions that the Commission could legally establish rates which violated the absolute prohibition of Section 21 plaintiff in error refers to the provision of Section 22 to the effect that a railroad corporation which failed or refused to conform to the rates established by the Commission should be

fined not exceeding $20,000 for each offense, and also the provision of Section 22 that in all contentions, civil or criminal, the rates established by the Commission shall be deemed conclusively just and reasonable.

But, as we have seen, under the self-declared rule for the construction of the Constitution of California, its provisions are mandatory and prohibitory unless expressly declared to be otherwise. Therefore, the provision of Section 22 that any railroad corporation or transportation company which shall fail or refuse to conform to such rates as shall be established by such Commission shall be fined not exceeding $20,000 refers unquestionably to rates constitutionally established—*that is to rates which do not violate the absolute prohibition of Section* 21. And so must the provision that the rates established by the Commission shall be deemed to be conclusively just and reasonable refer to rates constitutionally established by the Commission. We submit that the authorities cited and argument made in the foregoing part of this brief conclusively show that such is the case.

Plaintiff in error makes no attempt to argue that the *dicta* contained in the opinion of the Commission in the *Scott, Magner & Miller* case is sound law, but merely quotes from the opinion in support of its contention that the Commission could constitutionally establish rates which contravened the absolute prohibition of Section 21. Notwithstanding the statement that the *Scott, Magner & Miller case* "was a contested case" the conclusion appears irresistible that the Commission did not give any consideration to Section 22 of Article I of the Constitution which

provides that the provisions of the Constitution are mandatory and prohibitory unless by express words they are declared to be otherwise. This section of the Constitution is not referred to in the opinion nor is there anything therein contained which would indicate that it was referred to by any of the attorneys present at the argument. We believe the fact to be that the argument of the railroads' attorneys was adopted by the Commission because it seemed plausible and because it was never replied to by the attorneys present. This appears all the more likely when it is seen, by reference to the opinion itself, that the determination of this question by the Commission was not in any manner necessary to the disposition of the matter under consideration at the time.

*Section* 21 *contains a special prohibition against a certain kind of rates which were deemed inimical to the best interests of the State. Section* 22 *contained the general provision authorizing the establishment of all rates. This provision was intended to be most comprehensive and for the purpose of securing adherence to the established rates the penal provisions referred to were made a part of the Section.* These penal provisions applied to all rates established by the Commission and were a part of a comprehensive plan for the establishment of rates by the Commission. It does not follow because such or similar penal provisions were not annexed to the special prohibition of Section 21 that this prohibition was not binding upon the Commission, but was thereby reduced to a mere rule for its "guidance" which the Commission could follow or ignore in its discretion.

The provisions of Section 22 that in all controversies, civil or criminal, *the rates established by the Commission shall be deemed conclusively just and*

*reasonable do not add anything to the meaning of the section. These words are wholly unnecessary as if they were omitted from the section the rates established by the Commission would be conclusively just and reasonable.*

The provision that the Commission shall establish rates by its very terms implies that the rates shall be deemed conclusively just and reasonable in all proceedings, civil or criminal, subject only to the provision of the Federal Constitution that they shall not deprive the carrier of its property without due process of law. Any other construction of this provision would render the whole section nugatory.

The Interstate Commerce Act which confers upon the Interstate Commerce Commission the power to establish rates contains no express provision that the rates so established shall be deemed to be conclusively just and reasonable in all civil and criminal proceedings but they are conclusively just and reasonable nevertheless.

In any civil action to recover for an overcharge or in any criminal action involving a rebate can it be questioned that the Court must conclusively presume that the rates fixed by the Interstate Commerce Commission are just and reasonable? By this is meant that no evidence will be permitted to be introduced to the effect that the rates are unjust or unreasonable. The determination of the question of their justice and reasonableness has been committed to the Commission, and it is without the province of the courts to pass upon that matter.

Section 22 of the Constitution, as amended October 10th, 1911, which confers upon the Commission the power to establish rates, does not contain any express

provision that the rates so established shall be deemed conclusively just and reasonable nor does the Public Utilities Act contain such a provision. Nevertheless the rates established by the present Commission are conclusively just and reasonable and their justice and reasonableness are not open to question in any civil or criminal proceeding whatsoever, provided always of course that they are not confiscatory.

The proceedings of the Constitutional Convention of 1879 clearly show how the *express* provision that the rates should be deemed conclusively just and reasonable came to be inserted in Section 22.

The sentence containing this provision was not contained in the original draft of the Section as reported by the Committee on Corporations other than Municipal. Judge Campbell offered an amendment providing that there should be added to the Section a sentence reading as follows:

> "The rate of freights and fares established by said Commissioners shall, in all controversies and proceedings, whether civil or criminal be deemed *prima facie* just and reasonable."

*The purpose of the part of Judge Campbell's amendment providing that the rates established by the Commission should be deemed prima facie just and reasonable was to deprive the rates fixed by the Commission of their conclusiveness.* Judge Campbell clearly realized that the provision of Section 20 (now Section 22) to the effect that the Commission should have power to establish rates and fares *meant that the fares so established should be deemed conclusively just and reasonable.* He said (pg. 541):

> "The report of the committee, it seems to me, goes too far in one direction, and not far enough

> in another. In one respect it confers absolute powers upon the Commission; it enables them to fix rates of freights and fares, reasonable or unreasonable, without any appeal from their judgment, without any right to contest in any way the fairness of their proceedings."

His purpose in proposing the amendment that they should be deemed *prima facie* just and reasonable was to render them reviewable by the courts. He said (pg. 592):

> "Now there is one point where this amendment presented by myself, differs from that presented by the Committee on Corporations. It is this: I do not in this give them absolute power to fix just rates as they please, without any appeal. In my amendment, if the railroad deems the rates unreasonable, it may take its chances in going into the courts; and if it does go there, the rates fixed by the Commissioners are deemed *prima facie* evidence that the rates are reasonable, and the burden of proving that they are not so rests upon the corporation."

Judge Campbell said:

> "The report of the committee, it seems to me, goes too far in one direction, and not far enough in another. In one respect it confers absolute power upon the Commission; it enables them to fix rates of freights and fares, reasonable or unreasonable, without any appeal from their judgment, without any right to contest in any way the fairness of their proceedings."

Judge Campbell's amendment was amended by

changing the words "prima facie" to "conclusively."

Mr. Cross (page 607) with reference to the words "prima facie" used in Judge Campbell's proposed amendment said:

> "There could not be a more favorable provision to the railroad company than the one we have adopted. After we have removed from the Legislature the power to regulate fares and freights, and placed it in the hands of the Commission we say that the rates established by them shall be *prima facie* rates. * * * We have got to send this back to the Committee on Corporations and change this, or let it go out to the people of this State that this Convention has fallen into the hands of this railroad company; that a gentleman here by a strong anti-railroad speech, and sandwiching in this word *prima facie* blinded this Convention and made us the tools of the railroad."

Later Mr. Campbell (pg. 608) defended the use of the words "prima facie" and said he did not think that the testimony of a railroad official and an interested party that a rate in his opinion was unreasonable should be deemed sufficient to overcome the presumption that the rate was reasonable.

Mr. Cross (pg. 610) asked Mr. Campbell this question:

> "Would the gentleman not consent to amend his resolution so as to have the words 'prima facie' striken out and the word 'conclusive' inserted?"

Mr. McCallum (pg. 610) proposed the following amendment to Mr. Cross's amendment:

> "*Resolved,* That the Committee on Corporations other than municipal be instructed to further amend Section Twenty, as adopted by the Committee of the Whole, by striking out the words 'prima facie' as they occur near the last of the section, and inserting instead thereof the word 'conclusively.' "

With reference to the words "In all controversies civil or criminal the rates of freights and fares established by the Commission shall be deemed prima facie just and reasonable" proposed by Judge Campbell's amendment, Mr. McCallum said:

> "*Strike those words out entirely.* You have said in one place that the Commissioners shall have power to establish rates of freights and fares. *Having said that, this other is simply unnecessary,* except upon the idea that you propose to say that the rates so established shall be only prima facie just and reasonable. This will leave the rates fixed by the Commissioners the legal rates, as in any other case where they are fixed by authority of law."

Mr. Estee, the chairman of the Committee on Corporations other than Municipal, with reference to the words "prima facie" (page 613), said:

> "And the words 'prima facie' are undoubtedly worse—worse than all. *It makes the entire preceding portions of the section meaningless.* In other words, the first part of the section says they shall have power to regulate freights and fares. The Commissioners may establish rates of freights and fares."

Mr. Estee further said:

"The next proposition is that of the gentleman from Placer, Mr. Filcher, which provides for striking out the words 'prima facie,' and inserting the word 'conclusively.' That would not be right at all; and why? You leave the section as it stood, and it provides that the Commissioners shall fix the rate of freights and fares. *That it is true, is conclusive. That is conclusively beyond any question.*"

Mr. Howard said (pg. 614):

*"Now, sir, I am in favor of striking out the words 'prima facie." They are not necessary, and ought not to be there.* Because, if the Commissioners can decide, for instance, that five cents per ton per mile is the rate to be charged, *then that decision is conclusive, unless we take the breath all out of it by saying that it shall be only prima facie. It is just as conclusive as a decision of the Supreme Court of the State, or any other Court.*

Briefly stated, the situation was as follows: The section, as first reported by the committee, contained identically the same provision with reference to the power of the Commission to establish rates as the section finally adopted by the convention and by the people. Judge Campbell proposed an amendment providing penalties, and also providing that "The rates of freights and fares established by said Commission shall, in all controversies and proceedings, whether civil or criminal, be deemed *prima facie* just and reasonable." The amendment in this form was temporarily adopted; but upon further consideration it was realized that the words "prima facie" had the effect of rendering the whole section nugatory. Some

were in favor of striking the clause out entirely, while others wished to change the words "prima facie" to "conclusively." It was conceded that the meaning was the same, whether the clause was striken out bodily or the word "conclusively" inserted. *Either method of dealing with the clause had the effect of rendering the rates established conclusively just and reasonable.* In view of the fact that such amendment had been temporarily accepted, it was probably deemed better to change the words "prima facie" to "conclusively," so that the contention could never be made that by striking out the "prima facie" clause the convention intended that the rates should not even be deemed "prima facie" just and reasonable.

Plaintiff in error states:

> "Plaintiff's whole case proceeds upon the theory that notwithstanding these rates had been fixed in the most formal manner by the Railroad Commission, the carrier should have obeyed the supposed mandate of the Constitution and charged the lesser rate."

Not only were the rates not "fixed" in a formal manner but if the Commission attempted to establish a greater charge for the shorter distance its act being in direct violation of Section 21 of Article XII of the Constitution was a mere nullity. As to the "supposed mandate" of the Constitution referred to by plaintiff in error it may be said that this mandate was expressed in terms so plain and unmistakable as to leave not the slightest doubt that a person was entitled to have his property transported for the shorter distance at charges not exceeding the charges for the

greater distance. We will again quote the Constitutional provision:

> "Persons and property transported over any railroad, or by any other transportation company or individual, shall be delivered at any station, landing or port, at charges not exceeding the charges for the transportation of persons and property of the same class, in the same direction, to any more distant station, port or landing."

If this provision of the Constitution did not render a greater charge for the shorter distance unlawful it would be extremely difficult to imagine either a constitutional or statutory provision that would render unlawful any charge made by a carrier.

Plaintiff in error cites the case of *Factors & Traders Insurance Co.* v. *New Orleans,* 25 La. Am. 454, which was an action to recover a tax under a statute subsequently held unconstitutional. In that case the Court held that the plaintiff could not recover. This decision is in line with the great weight of authority in cases of taxes voluntarily paid under statutes subsequently declared unconstitutional. These decisions are placed upon the ground that money so received by the public authorities should not be refunded for the reason that the public interest might suffer if repayment were required. These decisions are based upon the theory that the public authorities may have expended the money so received or may have incurred liabilities upon the assumption that the money so received was a part of the public funds.

Plaintiff in error quotes a portion of the opinion of the Court in *Factors & Traders Ins. Co.* v. *New*

*Orleans, supra,* wherein the Court states that "rights may be acquired under a law which may be determined to have been unconstitutional." This statement of the Court is referred to in support of the contention of plaintiff in error that it has the right to retain illegal and excessive charges collected by it because they were specified in tariffs purporting to have been approved by the Railroad Commission, notwithstanding the act of the Commission directly contravened the mandate of the Constitution which in express terms made the charges collected illegal.

In the opinion of the learned Judge of the District Court rendered upon sustaining the demurrer to the alleged defense that the rates charged were established by the Commission it is said (Record pg. 362):

> "The fourth defense sets up that the rates obtaining prior to October 10, 1911, when the Constitutional provision was amended, were authorized by the Commission and could not be deviated from by the carrier without subjecting it to severe penalties as provided in Section 22 of the same article of the Constitution.
>
> "But the answer to this is that until the amendment of October 10, 1911, empowering the Commission to relieve carriers in special instances from the effects of the long-and-short-haul clause, the prohibition was absolute and as obligatory upon the Commission as upon the carrier. Before that amendment the Commission was as powerless to fix rates in contravention of the prohibition as the carrier was to charge them; and if it assumed to do so its act was simply void and not only cast no obligation upon the carrier to obey its order, but afforded no protection for such obedience. There is nothing of substance in the claim that Section

22, when construed *in pari materia* with Section 21, is a limitation upon the latter or in any respect modifies the provisions of the clause in question. Obviously, the rates which the Commission is empowered to fix under Section 22 are to be fixed in subordination to the prohibition found in Section 21, and it is only rates so fixed that are to be 'deemed conclusively just and reasonable,' either as an obligation upon or protection to the carrier. Any other interpretation of the sections would be in violation of cardinal rules of construction. This defense is therefore not well taken."

**7. THAT IT WAS NOT INCUMBENT UPON THE PLAINTIFF BELOW TO PROVE THAT THE COMMISSION HAD NOT RELIEVED PLAINTIFF IN ERROR FROM THE PROHIBITION OF THE CONSTITUTION, BECAUSE IF SUCH RELIEF HAD BEEN GRANTED, IT WAS A MATTER OF DEFENSE WHICH THE LAW REQUIRES THE DEFENDANT TO PLEAD AND PROVE.**

Plaintiff in error contends that the District Court should have granted the defendant's motion for a nonsuit as to the causes of action accruing after October 10, 1911, because the plaintiff did not affirmatively show that defendant had not been relieved from the prohibition of Section 21, Article XII, as amended October 10, 1911.

This contention is opposed to the well established rule of pleading in civil cases that if a defendant desires to bring himself within an exception contained in a statute he must affirmatively plead and prove the facts showing that he comes within the exception.

*Prima facie* the charging of more for the shorter than for the longer distance was illegal under Section 21 of Article XII as amended. If, upon the carrier's application in a special case, and after investigation, the Commission had in any case granted relief it was incumbent upon the plaintiff in error to plead and prove it.

Plaintiff in error refers to the allegation of the complaint that the Commission had not authorized the defendant to charge less for the longer distance and the statement is made that counsel for the plaintiff "saw the necessity" of "negativing the idea that the Railroad Commission might have granted relief."

The allegation of the complaint referred to was wholly superflous.

Notwithstanding this allegation of the complaint, the plaintiff in error alleged as a separate defense that the Railroad Commission had relieved it from the prohibition of the Constitution and the demurrer to this defense was overruled by the Court.

Plaintiff in error states that "upon familiar principles of pleading it was incumbent upon plaintiff to make this showing of non-action by the Commission affirmatively," but it is not stated what this familiar principle is.

Furthermore, even if the Court had erred in denying the motion for a nonsuit, the error was cured by defendant's introduction of the evidence supplying the alleged defect in plaintiff's evidence:

*Higgins* v. *Ragsdale,* 83 Cal. 219, 221.

*Russell* v. *Pacific Can Co.,* 116 Cal. 527, 530.

Plaintiff in error states that it does not appear that the orders offered by the defendant "were all the orders made by the California Commission."

The argument here is, in effect, that defendant in error might have offered in evidence some order of the Commission inuring to the benefit of plaintiff in error, which order plaintiff in error has overlooked—in other words that defendant in error might have made a better attempt at sustaining plaintiff in error's defense than plaintiff in error itself did.

If defendant in error had been required to show affirmatively that plaintiff in error had not been granted relief, such showing would have involved the

proof of a negative. In proving a negative very slight evidence is sufficient to shift the burden of making a *prima facie* case.

Without reference to the order offered in evidence by plaintiff in error, the admissions made at the trial would have been sufficient proof of the negative. At page 397 of the Record the admission is made that the applications for relief were not filed with the Commission until December 30, 1911, and at page 406 of the Record the further admission is made "that these petitions may be considered to have been pending until May 27, 1912, and that they had not been specifically acted upon either prior to that time or since that time except insofar as the decision in Case No. 116 may be considered to have affected them." The Court asked: "They were never specifically acted upon?", and to this question counsel for plaintiff in error replied "No, your Honor." With reference to Case No. 214, in which the applications were filed, it was admitted that on January 2, 1912, when the case came on for hearing "a discussion was held, but no evidence introduced, nothing further was done; it was postponed without day." (Record page 423.)

**8. NO REPARATION ORDER OF THE RAILROAD COMMISSION WAS NECESSARY IN ORDER TO ENTITLE THE PLAINTIFF, OR ITS ASSIGNORS, TO MAINTAIN AN ACTION IN THE COURTS.**

In ruling against this contention of plaintiff in error that the Court had no jurisdiction because it was not alleged in the complaint that plaintiff had obtained a reparation order from the Railroad Commission, the learned Judge of the District Court said (Record, page 363):

> "Logically, the sixth defense, as involving the jurisdiction of the Court to entertain the action, should be first disposed of. Its allegations proceed upon the theory that the Court has no jurisdiction of the subject-matter of the action because plaintiff has not applied to the Railroad Commission for a reparation order as provided in Section 71 of the Public Utilties Act of December 23, 1911. (Chapter 4, Stats. Cal. Spec. Sessn. 1911).
>
> "But this section has reference, when properly construed, only to instances where the question whether the carrier has charged an excessive or discriminatory rate is dependent upon facts to be ascertained from an investigation upon evidence taken by the Commission as in *Texas & Pacific Ry. Co* v. *Abilene, etc., Co.,* 204 U. S. 216, and *Robinson* v. *B. & O. R. R.,* 222 U. S. 506. It can have no application to an instance where, as here, if the over-charge was made as alleged it was unwarranted as matter of law. In such case the rate 'was unlawful under any pretense or for any cause' and was not question to be referred to the Commission (*Pennsylvania R. R. Co.* v. *International Coal Co.,* 230 U. S. 184), but falls within the provisions of Section 73 (subdivision A) of the Utilities Act, which authorizes the aggrieved party to prosecute an action

> in the courts 'for any loss or injury arising from a failure of the carrier to do any act or thing required to be done by the Constitution or any law of the state or any order or decision of the Commission.' This defense is therefore untenable."

This matter has already been passed upon both by the District Court of Appeal for the Second Appellate District of California and also by the Supreme Court of California. The decision of the District Court of Appeal referred to is *Southern Pacific Company* v. *Superior Court of Kern County,* 20 Cal. App. Dec. 674, 685. After citing the case of *Penn. R. R. Co.* v. *International Coal Co.,* 230 U. S. 184, the District Court of Appeal said (page 685):

> "In the case at bar, we have a situation analogous to that in *Pennsylvania R. Co.* v. *International C. M. Co., supra.* The cause of action of the San Joaquin Valley Commercial Association, plaintiff in the court below, was based upon a charge which the plaintiff claims was illegal 'under any pretense or for any cause.' If the alleged illegality had been included in a charge made in following an unreasonable or discriminatory schedule of tariffs, the case would be primarily within the exclusive jurisdiction of the Railroad Commission, because that body could regulate and change the tariff itself and could award suitable reparation to be made for any wrong that had been done. But the plaintiff's claim in this action was that the Constitution of the State of California prohibited the defendant from collecting a higher freight charge on transportation of goods from Oakland to Bakersfield than the established rate for a like kind of goods shipped from Oakland to Los Angeles."

The District Court of Appeal further said (pg. 685):

> "The record here shows that the demand actually was founded upon the claim that the plaintiff's assignor had been compelled to pay a charge which was illegal in that it was in violation of the 'long-and-short-haul' clause of the State Constitution. If the charge was thus in conflict with the Constitution, it was a charge beyond the jurisdiction of the Railroad Commission, because it was a charge that the Railroad Commission could not legalize after it was made and paid, however just the amount might seem to be—conceding that it could legalize any subsequent charges. The jurisdiction to pass upon an alleged illegal charge of this kind is necessarily vested in the courts, because the law has provided no other source of relief."

Plaintiff in error refers to the opinion of the Supreme Court of California rendered upon a denial of a hearing after decision by the District Court of Appeal. This opinion is reported at 50 Cal. Dec. 36, and at 150 Pac. 404.

In the course of its opinion, the District Court of Appeal (*vide* first quotation *supra*) said "if the alleged illegality had been included in a charge made in following an unreasonable or discriminatory schedule of tariffs, the case would primarily be within the exclusive jurisdiction of the Railroad Commission."

Pending the application for a hearing a member of the bar of the Supreme Court on behalf of a client who had been required to pay an unreasonablely high rate filed a petition as *amicus curiae* in the Supreme Court requesting the Court to disapprove of this language in the event the Court should deny a hearing. It was in answer to this petition that the Supreme Court used the following language quoted in the brief of plaintiff in error:

> "Our denial of the application for a hearing in this Court is not to be taken as an approval of the views of the District Court of Appeal or to the necessity of such action (viz.: prior action on the part of the Commission) in any case."

If the Supreme Court had any doubt as to the necessity of prior action on the part of the Commission such doubt had no relation to the case considered by the District Court of Appeal but related merely to a case where unreasonable or discriminatory charges had been collected. Moreover there is nothing in the language used by the Court to indicate any doubt on that point. The Court merely declined to pass on the question because it was not involved.

Plaintiff in error states (pg. 130):

> "We take the ground that at least since March 23d, 1912, after which date this suit was instituted, *and perhaps before,* a plaintiff who has paid a greater charge for a given distance than the carrier was charging for the same class of property for a greater distance over the same line or route, but who nevertheless has paid the rate fixed by the Railroad Commission of California for the actual movement, and who claims reparation on the ground of a violation of the long and short haul clause either of the Constitution of 1879 or the amendment of 1911, must first apply to the Commission for and secure an order prescribing the amount of reparation to which he is entitled."

From the foregoing it appears that plaintiff in error's contention that a reparation order is necessary is based mainly upon the provisions of the Public Utilities Act, which became effective March 23rd, 1912. Although it is not expressly conceded that the courts had jurisdiction before March 23rd, 1912,

nevertheless it is not claimed that they had not jurisdiction.

In support of its contention plaintiff in error quotes the last sentence of Section 21 of Article XII of the Constitution as amended October 10th, 1911, which sentence reads as follows:

> "Nothing herein contained shall be construed to prevent the Railroad Commission from ordering and compelling any railroad or other transportation company to make reparation to any shipper on account of the rates charged to said shipper being *excessive* or discriminatory, provided no discrimination will result from such reparation."

It is stated that the provision quoted above "clearly shows it to be the intention of the framers of the amendment to confine to the initial jurisdiction of the Commission cases for recovery of an excessive charge." It is also said that the word "excessive" is used with deliberation, for its meaning is different from that of the word "discrimination."

In the first place, we submit that the provision quoted above, even as applied to cases of unreasonable and discriminatory charges, does not confer exclusive jurisdiction upon the Commission. It possibly amounts to a grant of power to the Commission to award reparation in such cases, but does not restrict such jurisdiction to the Commission. Secondly, the word "excessive" refers unquestionably to *unreasonable* charges. Doubtless, as stated by plaintiff in error, the meaning of this word is different from "discrimination." The charges sought to be recovered in this action are *unlawful* charges—they may also be described as "excessive," but they are excessive because unlawful and not because they are

unreasonable. There is no admission that they are reasonable. In addition to being illegal they may also be unreasonable, but this action is based upon their illegality.

Referring to the part of Section 21 of the Constitution quoted above, and to Section 71 of the Public Utilities Act, plaintiff in error states:

> "The word 'excessive' is used with deliberation, for its meaning is different from that of the word 'discrimination.' In this respect the framers of the amendment of 1911 and of the Public Utilities Act did not follow the provisions of the Interstate Commerce Act, upon which are based the numerous decisions of the Commission and the courts defining the respective jurisdictions of the Commission and courts."

Even if such a distinction did exist between the Constitution and statutes of California and the Interstate Commerce Act, we fail to see its materiality here; but as a matter of fact *such distinction does not exist*. Plaintiff in error states that Sections 13, 14 and 15, of the Act to Regulate Commerce provide only for applications to the Commission by complaint "of anything done or omitted to be done by any common carrier subject to the provisions of this Act in contravention of the provisions thereof." *The Act expressly declares unlawful the charging of unreasonable and discriminatory rates.*

Plaintiff in error states:

> "The provisions of Section 73-a of the California Act, giving a right of action 'for actual damages,' and in some cases for exemplary damages, for violation of the Act, do not authorize suit to recover for an excessive or discriminatory charge. The exclusive primary

jurisdiction is vested in the Commission by the reparation section."

For the convenience of the Court we quote below Section 73(a) of the "Public Utilities Act," reading as follows:

> "73(a) In case any public utility shall do, cause to be done or permit to be done *any act, matter or thing prohibited, forbidden or declared to be unlawful* or shall omit to do any act, matter or thing required to be done, *either by the Constitution, any law of this State* or any order or decision of the Commission, *such public utility shall be liable to the persons or corporations affected thereby for all loss, damages or injury caused thereby or resulting therefrom,* and if the Court shall find that the act or omission was wilful, the Court may in addition to the actual damages award damages for the sake of example and by way of punishment. *An action to recover for such loss, damage or injury may be brought in any court of competent jurisdiction by any corporation or person.*"

Plaintiff in error's argument is that this section "does not authorize a suit to recover for an excessive or discriminatory charge." But it is apparent that on its face Section 73(a) *does* give the right to prosecute in the courts an action for damages for an unreasonable or discriminatory charge. Broader language could not be used. Unreasonable and discriminatory rates are declared to be unlawful both by the Constitution and by the Public Utilities Act, and by Section 73(a) it is provided that any public utility which shall do or permit to be done "*any act, matter or thing prohibited, forbidden or declared to be unlawful either by the Constitution*

*or any law of this State,"* shall be liable to the person affected thereby for damages, *and that an action to recover such damages may be instituted in any court of competent jurisdiction.*

Section 73(a) is certainly broad enough to cover *not only illegal charges such as are here sought to be recovered, but also unreasonable and discriminatory charges,* and if it should ever be construed by the courts to mean that it does not cover unreasonable and discriminatory charges, such construction will have to be based upon the ground that to allow the courts jurisdiction in such suits would be subversive of the purpose of the Act, as held in *Texas & Pacific* v. *Abilene Cotton Oil Company,* 204 U. S. 426, *supra,* and *Robinson* v. *B. & O. R. R.,* 222 U. S. 506. As already pointed out, the language is much broader than that used in the Interstate Commerce Act. However, we are not here concerned with the question as to whether or not damages for charging an unreasonable rate can be recovered in an action at law without prior application to the Commission. That matter involves a rate-making question. *No such question is presented to the court by this action.*

Plaintiff in error states that the "omission" of the word "excessive" in Section 73(a) quoted above, and its use in Section 71(a), is significant. Section 71(a) reads as follows:

> "When complaint has been made to the Commission concerning any rate, fare, toll, rental or charge for any product or commodity furnished or service performed by any public utility, and the Commission has found, after investigation, that the public utility has charged an

> excessive or discriminatory amount for such product, commodity or service, the Commission may order that the public utility make due reparation to the complainant therefor, with interest from the date of collection; provided no discrimination will result from such reparation."

It is quite clear, as we have seen, that Section 73(a) in terms covers claims for excessive and discriminatory charges, as the language used is most comprehensive. There is no attempt made by Section 73(a) to enumerate the various acts which would constitute a violation of the act or the Constitution, *so it follows that there is nothing significant because excessive and discriminatory charges are not mentioned.*

Plaintiff in error states:

> "We say that it was the deliberate intention of the Constitution not to allow a court to construe tariffs, schedules and classifications and first to say that there was in effect at the time of the movement to the intermediate point a lesser rate to a more distant point, and then to say that the lawful rate to the intermediate point was not the rate established by the Commission, but was a rate which the Commission had not established for that point but had, for good and sufficient reasons, established to the more distant point; and finally to give judgment for the plaintiff for the difference, without giving the Commission the opportunity to obey whatever mandate is implied by the long and short haul clause, by taking its option of either

raising the through rate or lowering the intermediate rate."

It is said that the courts cannot "construe" tariffs —in other words, that the court cannot determine what every shipper of freight must determine, viz. what rate should be charged for the shipment of a specific article or personal property. It is determined by the shipper by a mere examination of the tariff and is determined by the courts in the same manner. A tariff or schedule of rates published in pursuance of law is said to be in effect a statute, and with equal force it might be said that the courts cannot construe a statute. In the foregoing quotation from its brief, plaintiff in error has confused the question of jurisdiction with its claim that the rates were "established" by the Commission and were, therefore, lawful. Nothing is gained by this confusion. For the purpose of determining this question of jurisdiction we must assume that the rates were unlawful. Therefore the court is called upon in an action of this character to say (1) that there was in effect at the time of the movement to the intermediate point a lesser rate to a more distant point, and (2) that the lawful rate to the intermediate point was the rate charged to the more distant point.

It is said that an action in the courts without first applying to the Commission for reparation does not give the Commission "the opportunity to obey whatever mandate is implied by the long and short haul clause by taking its option of either raising the through rate or lowering the intermediate rate." But, as we have already seen, ~~shall hereafter show~~, neither the Commission nor the carrier could establish rates which violated the constitutional provision and that any

such rates would be unconstitutional and void. If the Commission attempted to "establish" a lower rate for the longer haul than for the shorter haul the carrier was charged with notice of its unconstitutionality and was in duty bound to ignore it.

Plaintiff in error in effect admits the charging of an unlawful rate, for which there can be no legal excuse. It is no answer to an action to recover damages for this act to say that the Commission could have required the carrier to raise its rate to the long haul point or to lower its rate to the intermediate point, so that there would be no violation of the law. *The Commission could not authorize a violation of the law, nor can a carrier excuse a violation of the law by saying that the Commission could have prevented it.* That the Commission could have prevented the exaction of these unlawful charges may be true, but the fact that it did not do so cannot help the plaintiff in error.

With further reference to the contention that "it was the deliberate intention of the Constitution not to allow the courts to construe tariffs," it may be said that in a great variety of actions, concerning which it was never questioned that the courts had jurisdiction, it is necessary to "construe" tariffs and schedules of rates. In all action to recover damages for rebates and overcharges the courts are called upon to construe tariffs.

Plaintiff in error states that the Commission is "the only body in the State having jurisdiction of rates" and that "all of the record evidence necessary in any case under the long and short haul clause is in the files of the Commission itself." But the Commission is not the only body "having jurisdiction of

rates'' although it is the only body having the jurisdiction to *make* rates. Nor is ''all the record evidence in this case in the files of the Commission.'' The only record evidence necessary in this case is the tariff showing a lower charge to the more distant point, and these tariffs are on file for public inspection at various offices of the carrier throughout the State, and the carrier may be compelled to produce them at the trial of any action in which they are material evidence.

It is said that the Commission ''has rate experts and attaches who we must presume are capable of giving it expert and unbiased testimony when the question arises in a long and short haul case as to what the through rate is.'' This is not a matter requiring ''expert testimony,'' and if it were that testimony could be given in court by other witnesses than the experts and attaches of the Commission. This is a very simple question of fact which can be determined by a court or jury, and if ''expert testimony'' is required, it can be given.

Plaintiff in error states:

> ''It (the Commission) knows also whether, since October 10th, 1911, it has, to use the language of Section 22, authorized the carrier to charge less for the longer than for the shorter distance.''

This is likewise a very simple question of fact, readily ascertainable from the public records of the Commission. The Court at the trial of this action had no difficulty in determining the question.

Again it is said:

> "*More important than all,* if the right to reparation exists in case of violation of the long and short haul section it (the Commission) can adjudicate the reparation claims as to prevent the evil of rebating and discrimination which inevitably would arise if one court were permitted to hold our contentions in this case on the general question of jurisdiction to be correct, and another court were allowed to uphold the plaintiff's position."

This is a remarkable statement. If it were possible under the authorities for a trial court of California to uphold the contention of plaintiff in error while other courts upheld their jurisdiction no "evils of rebating or discrimination would arise" for the trial courts are not the courts of last resort. All judgments would be subject to review by the Supreme Court of the State and the decision of the court of last resort reversing or affirming the judgments, as the case might be, would soon establish a uniform rule as to jurisdiction binding on all the trial courts.

Plaintiff in error cites the case of *St. Louis Southern Ry.* v. *Patterson,* 104 N. E. 512, which plaintiff in error states involved the question of overcharges on an interstate shipment. The so-called overcharge was based upon the contention of plaintiff that it demanded cars of 50,000 pounds capacity but was furnished with cars of only 40,000 pounds capacity. The defendant's tariff specified a minimum charge of $5 per car and also specified a switching charge of $2 per car irrespective of capacity. Plaintiff claimed that it was "overcharged" $1.46 per car because it was not furnished cars of 50,000 pounds capacity.

This was not an overcharge in the sense that the exaction of a greater sum than the tariff rate or of a rate fixed by law is an overcharge, as it involved the determination of the administrative question as to whether the refusal to furnish the cars of the capacity demanded was reasonable. It would seem that such a question should properly be determined by the Interstate Commerce Commission. However, the Supreme Court of Indiana does not seem to have expressly placed its decision upon this ground but placed it upon the ground that if the courts of different States might decide the question in different ways, thereby destroying the uniformity of rates secured by the Interstate Commerce Act. The Indiana court held, therefore, that the State courts did not have jurisdiction. It was evidently of the opinion that the Federal courts had jurisdiction.

Plaintiff in error states that a justice of the peace in one township might decide that the tariff rate to Los Angeles on a certain commodity was 37½ cents per hundred pounds, and that a justice of the peace in some other township might decide that the tariff rate was more or less than 37½ cents. So in a case for damages for rebating one court might erroneously find that a certain rate was the legal rate and another court in which the same question was involved might find that a different rate was the legal rate, but the fact that a court is liable to make an erroneous finding has never before been advanced as a reason why a court should not entertain jurisdiction of a case. Nor has such an argument ever before, so far as we can ascertain, been advanced in any case where the question arose as to whether the courts or the Railroad Commission had jurisdiction

of a claim for damages or reparation. A person is protected against erroneous findings by the right of appeal. In some cases the court of last resort may fall into a like error. Against such a contingency there is no protection. As said by the Supreme Court of California in *Sherer* v. *Superior Court,* 94 Cal. 355, such errors, "however gross or glaring they may be, must be submitted to as a part of the sacrifice which every individual is compelled to yield to the infirmities of human government."

Plaintiff in error states:

> "For the Court to hold that by reason of greater diligence on the part of a shipper or his attorney, community prejudice against one of the parties, greater ability of one attorney for the other, neglect or disinclination to obtain review of judgments, one shipper may obtain the benefit of a rebate from published tariff rates by using the pretense of the long and short haul clause, while his neighbor may be deprived of that benefit, even though he seeks to obtain it in a lawful way, is merely to encourage another form of discrimination."

If there has been a violation of the constitutional prohibition against charging more for the short than for the long haul, and a shipper has thereby been compelled to pay an illegal charge, he is entitled to recover his damages. It cannot be presumed that his neighbor will in a similar case be deprived of the right to obtain like redress; but on the contrary, it will be presumed that the courts will do justice to all and that judgments will be rendered in favor of every person who establishes that he has been overcharged or damaged. If a ship-

per has been damaged by the violation of the constitutional provision, he is entitled to his remedy, and the possibility that some other shipper may, by fraudulent collusion with a carrier, use the same constitutional provision as a pretense to secure a rebate in a case where there was no violation, is no argument against the courts' assuming jurisdiction of an action brought by one who has been actually damaged.

Plaintiff in error cites a number of cases where the jurisdiction of the Railroad Commission was held exclusive. *It is noteworthy that in not one of the cases cited was the question of rates or the question of an unlawful exaction involved.*

The first case cited is *State* v. *Chicago, St. Paul, Etc., Ry. Co.,* 19 Neb. 476, which was an application for a writ of *mandamus* to compel the defendant to stop trains and build a depot. The Commission was vested by the Legislature with "general supervision of all railroads," and the statute provided that when changes in its stations and depots were desired the Commission should, after a hearing, adjudge what changes it deemed proper.

In *People* v. *B. H. R. Co.,* 172 N. Y. 90, next cited, it was held that the Railroad Commission had exclusive jurisdiction of an application to compel the restoration of train service.

*Grand Trunk* v. *Perrault,* 36 Can. Sup. Ct. 671, next cited was an application to compel the railroad company to maintain farm crossings for the use of plaintiff. The statute empowered the Railway Commissioners, upon the application of any landowner, to order the company to provide suitable farm crossings. Referring to this case, plaintiff in error states:

> "The Court lays stress upon the fact that the act provided that the Board's determination of any fact should be binding and conclusive on all courts, and if there existed concurrent jurisdiction a world of conflict and confusion would ensue."

In *Grand Trunk* v. *McKay,* 34 Can. Sup. Ct. 81, next cited, it was held that the Railway Committee had exclusive power to regulate the speed of trains under a statute which provided that they "may" regulate and limit the speed of trains.

In *Bangor* v. *Railway Co.,* 97 Me. 163, the Court held that the statutes of Maine vested in the Railroad Commissioners the exclusive jurisdiction of the matter of railway crossings.

In *N. Y., N. H., etc., R. R. Co.* v. *New Haven,* next cited, it was held that the Railroad Commissioners and not the municipality had original jurisdiction of questions relating to changes in highways and grade crossings.

In *Missouri K. & T. R. Co.* v. *Richardson* (Ok.) 106 Pac. 1108, the Court held that the Corporation Commissioners had power to determine the proper point for the crossing of two railroads.

In *State* v. *Railroad Commission,* 140 Wis. 145, it was held that the Railroad Commission had the power to determine the point of crossing of railroad tracks.

In *Smith* v. *New Haven,* 59 Conn. 203, 208, it was held that the Railroad Commissioners had power to pass on the question as to whether a highway should pass under or over the tracks of a railroad company.

In *Cullen* v. *N. Y. R. Co.,* 66 Conn. 211, last cited, the Court held that the Railroad Commission and not the municipality had jurisdiction of the matter of closing highways which crossed the tracks of a railroad company.

The mere statement of the nature of the cases cited is sufficient to show that they are not authority for the proposition that the courts have not jurisdiction of actions of this kind.

Plaintiff in error has gone far afield in its search for authorities in support of its contention. The question here involved was decided contrary to the contention of plaintiff in error by the Supreme Court of the United States in *Penn. R. R. Co.* v. *International Coal Co.,* 230 U. S. 184, upon which were based the decisions of the learned Judge of the District Court and of the District Court of Appeal for the Second Appellate District.

## CONCLUSION

We believe the conclusion that no error was committed by the District Court will appear from the reading of the brief of plaintiff in error. In each instance, it is submitted, the inherent weakness of the contention made is revealed by its statement and by the arguments advanced in its support. It is respectfully submitted that the judgment of the District Court should be affirmed.

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